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Issue Date: 03 March 2003

CASE NO.: 2002 AIR 16
In the Matter of

JAN SVENDSEN
Complainant

v.

AIR METHODS, INC.
Respondent

APPEARANCES

Mr. Jan Svendsen, *Pro Se*

Ms. Elizabeth J. McNamee,¹ Attorney
For the Respondent

BEFORE

Richard T. Stansell-Gamm
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER -
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, (“AIR 21” or “Act”), as implemented by 29 C.F.R. Part 1979 (2002).² This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

PROCEDURAL BACKGROUND

On December 12, 2001, Mr. Svendsen filed a complaint with the Occupational Safety and Health Administration (“OSHA”), U.S. Department of Labor (“DOL”), alleging that Air Methods, Inc. (“Air Methods”) had terminated his employment as a pilot in retaliation for raising a safety

¹Subsequent to the hearing, I received notice of Ms. McNamee’s name change.

²29 C.F.R. Part 1979, Vol 67 Fed. Reg. 15454, Interim Final Rule, effective April 1, 2002.

concern on November 3, 2001 about dust pollution at, and around, the Parker Airport in Arizona.

On March 11, 2002, after an investigation of Mr. Svendsen's complaint, the Deputy Regional Administrator for OSHA notified the parties that he found no violation of the Act's employee protection provisions. Specifically, although Mr. Svendsen had engaged in a protected activity and established a *prima facie* case, the Regional Administrator determined that Air Methods had sufficiently established that his termination was due to performance and personal issues. On March 25, 2002, Mr. Svendsen objected to the findings and requested an administrative hearing.

Pursuant to a Notice of Hearing, dated April 10, 2002, I set a hearing date of April 25, 2002 for this case in Phoenix, Arizona (ALJ I).³ Due to scheduling issues, I later continued the case until June 22, 2002 (ALJ II). Prior to the hearing, I once again continued the case due to a communication issue (ALJ III). Eventually, I rescheduled the hearing for August 14, 2002 (ALJ IV). On August 14, 2002, under the provisions of 49 U.S.C. § 42121 (b) (2) (A), and 29 C.F.R. § 1979.107 (b), I conducted a hearing in Phoenix, Arizona with Mr. Svendsen and Ms. McNamee. A representative for DOL did not attend the proceeding.

Complainant's Statement of the Case⁴

On November 3, 2001, Mr. Svendsen made a routine safety report about a dirt race at the Parker Airport. A week later, he was called to Denver for a meeting without being informed of the purpose. At that time, he was terminated because of his report to the Parker police. The termination took just 30 seconds and he did not have an opportunity to explain why he called the police. On December 12, 2001, he filed his AIR 21 discrimination complaint.

Concerning the various reasons Air Methods has presented to support its action, Mr. Svendsen first notes that while he did receive an order form for a uniform, he never saw the other two pilots at the Parker Airport wear a uniform. No one ever approached him about the uniform requirement. The first time he received notice of the company's concern was at the Denver meeting.

Next, Mr. Svendsen has a problem with only one flight nurse. He doesn't understand why Mr. Titus made a complaint. Mr. Titus never approached Mr. Svendsen with his concerns. Mr. Titus could not have observed Mr. Svendsen call the FAA about Air Methods because Mr. Svendsen never made any such calls. Mr. Svendsen's clothes appeared rumpled because he rested wearing his clothes due to the short response time from notification to take off. Mr. Svendsen and the other pilot, Herbert, as new pilots did have some issues with Air Methods' operations. However, he never

³The following notations appear in this decision to identify specific evidence: CX - Complainant exhibit; RX - Respondent exhibit; JX - Joint exhibit; ALJ - Administrative Law Judge exhibit; and, TR - Transcript of hearing.

⁴TR, pages 94 and 483 to 503.

downgraded the Guardian Air supervisor, Ms. Hansen.

Turning to the stated expense report problem, Mr. Svendsen observed that he only submitted one expense report directly to Denver after collecting receipts for about two months. Rather than explain the correct process to Mr. Svendsen, the base manager made a decision not to reimburse Mr. Svendsen without even discussing the issue with him. So, in response, Mr. Svendsen sent an appeal to the chief pilot, indicating that the denial of reimbursement was unfair. As explanation, Mr. Svendsen indicated that he did try to contact the base manager prior to the expenditures. When those efforts failed, he followed the dispatcher's instructions to purchase gas for the aircraft tug and to get the tug repaired. Mr. Svendsen does not believe he should be required to carry expenses for Air Methods.

About the unauthorized flight allegation, Mr. Svendsen's short test flight was authorized by the owner of the aircraft, Guardian Air. Likewise, in regards to abandoning a medical crew in Kingman, Mr. Svendsen once again just followed the instructions of the Guardian Air dispatcher.

Finally, Mr. Svendsen reported the dust obstruction problem on November 3, 2001 because it was not posted as a NOTAM (notice to airmen) and he was concerned about other pilots' safety. When he reported the situation to the Prescott Flight Service Station ("FSS"), he was told to contact the airport manager or the police. Since Mr. Kelly, the airport manager, was not there and Mr. Svendsen was not able to talk to him, he called the police. He didn't want to stop the race. Mr. Svendsen only wanted to advise other pilots of the visibility hazard. However, one of the airport employees probably became upset when he asked for the phone number for the police. Eventually, Mr. Svendsen called the police and a truck watered the track to keep the dust down.

As relief, Mr. Svendsen seeks re-instatement and back pay.

Respondent's Statement of the Case⁵

Both due to an inadequate *prima facie* case and in light of Air Methods clear and convincing evidence of non-discriminatory reasons for termination of his employment, Mr. Svendsen's complaint under the Act should be dismissed.

Under the Act, Mr. Svendsen is required to establish a *prima facie* case of discrimination consisting of four elements before Air Methods is required to make any response. Mr. Svendsen has failed to present the requisite *prima facie* case because his testimony does not establish any of the elements. First, Mr. Svendsen did not show that Air Methods is a carrier subject to the Act. Second, Mr. Svendsen's complaint about blowing dust at the Parker Airport was not reasonable in objective terms. Although Mr. Svendsen may have subjectively considered the dust an air safety hazard, his belief was not objectively reasonable because a NOTAM had already been published about the potential hazard and in reality the dust did not prevent flying at the Parker Airport on that day. Third,

⁵Closing brief, dated September 27, 2002.

Mr. Svendsen's testimony does not establish that Air Methods was aware of his dust complaint. Fourth, Mr. Svendsen's belief that he suffered an adverse action due to his complaint does not raise an inference that his complaint contributed to his employment termination.

If Mr. Svendsen fulfills the requirements of a *prima facie* case, his complaint should still be dismissed because the clear and convincing evidence in the record, consisting of two independent and intervening events, shows Air Methods would have taken the same discharge action even in the absence of his November 3, 2001 dust complaint. A few days after the dust complaint, Mr. Titus, an employee of Guardian Air which used Air Methods transportation assets, informed Guardian Air and Mr. Svendsen's supervisor of his unprofessionalism and derogatory comments about the operations of Air Methods and Guardian Air. Additionally, about the same time of his dust complaint, Mr. Svendsen also presented an insubordinate letter to the chief pilot of Air Methods. According to the chief pilot, Mr. Svendsen's letter, standing alone, provided a sufficient basis for his termination. Consequently, when the corporate managers met with Mr. Svendsen and considered his case, they found multiple performance-based reasons, unrelated to any safety complaints, for terminating his employment.

ISSUES

21. 1. Whether the Complainant, Mr. Jan Svendsen, engaged in a protected activity under AIR
2. If the Complainant, Mr. Jan Svendsen, engaged in a protected activity as an employee of the Respondent, Air Methods, whether the protected activity contributed in part to the decision by the Respondent to terminate the employment of the Complainant.
3. If the Complainant, Mr. Jan Svendsen, establishes that his protected activity contributed in part to his termination, whether the Respondent, Air Methods, has demonstrated by clear and convincing evidence that it would have terminated the Complainant, even in the absence of the protected activity.

SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY

My decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to CX 9, RX 1 to RX 12, RX 14 to RX 20, and JX 1.⁶ While I have reviewed and considered all the evidence in the record, I have summarized below only the documents and testimony that may be relevant to the resolution of this case.

⁶At the hearing, Mr. Svendsen withdrew CX 11 (TR, page 37) and Ms. McNamee withdrew RX 13 (TR, page 40). CX 10, CX 12, and CX 13 were offered and not admitted (TR, pages 36 and 474). For references purposes, I have attached CX 10, CX 12, and CX 13 to the record. Post-hearing, I received the document previously identified as JX 1, which redacted information confidential to the Respondent's business (*see* TR, pages 16 to 20). Based on the redaction, I have crossed out the term, "Confidential" on each page of JX 1 and now admit JX 1 into evidence.

Joint Evidence

JX 1 - Excerpts: Airplane Services Agreement Between Flagstaff Medical Center ("FMC") and Air Methods Corporation. The agreement commenced on August 1, 2001 and will terminate December 3, 2007. Pilots will abide by Air Methods personnel policies and FMC rules concerning uniform, conduct, and appearance. The cost of uniform items is split between the parties. Removal of any pilot must be accomplished by a three person board consisting of two FMC managers (one medical and one administrative) and an Air Methods' manager. FMC disciplinary policies must be used as a guideline. However, at the same time, Air Methods may unilaterally exercise its right to remove its personnel. Finally, the FMC is required to provide all jet fuel for its flight activities.

Complainant's Evidence

Documentary Exhibits

CX 1 - List of documents that Mr. Svendsen "encouraged" Air Methods to "bring forward." The requested items include the aircraft logbook for aircraft N228A for the periods August 30 through September 1, 2001 and September 14, 2001.

CX 4 - FAR, Sections 135.19 to 135.25 (d) (2). Section 135.21 (d) (1) requires the certificate holder to provide to flight members a manual setting forth the certificate holder's procedures and practices which have been found to be acceptable by the FAA Administrator. According to Section 135.23.(f), this manual must include procedures for reporting mechanical irregularities that come to pilot's attention before, during and after flight. Additional procedures must enable the pilot to be able to determine both mechanical irregularities from previous flights and whether the correction of the noted irregularities have been accomplished or deferred.

CX 5 and CX 6 - FAR, Sections 135.64 to 135.69 (b). Section 135.65 (a) requires the certificate holder to provide an aircraft maintenance log that is carried on board each aircraft for recording or deferring mechanical irregularities and their corrections. Section 135.65 (b) requires the pilot in command to enter into the aircraft maintenance log book each mechanical irregularity that comes to the pilot's attention. Before each flight, the pilot must also ascertain the status of each irregularity noted in the maintenance log book. According to Section 135.67, "[w]henver a pilot encounters a potentially hazardous meteorological condition. . . the knowledge of which the pilot considers essential to the safety of other flights, the pilot shall notify the appropriate ground radio station as soon as possible."

CX 7, CX 8 and CX 9 - The Jeppson excerpt of a chart for the Parker, Arizona airfield and navigation map. The runway is oriented 010/190 degrees and is 4,780 feet in length. To the right (northeast) side of the runway, someone has drawn on the map an oval track running the length of the runway.

Sworn Testimony

Mr. Jan Svendsen (TR, pages 55 to 157 and 436 to 471)

[Direct examination] Mr. Jan Svendsen, the Complainant, who has been flying since 1986, was a pilot for Air Methods in November 2001. He had been flying for Mayo Aviation out of Denver, Colorado but about August 2001 Air Methods took over. He signed an employment contract with Air Methods as a pilot of a King Air, two engine aircraft, used as an air ambulance. He was making about \$40,000 a year.

As an Air Methods' pilot, Mr. Svendsen flew medical patients which required high levels of care. About 80% of his flights involved trips to Phoenix from Parker, Arizona. He worked 12 hour shifts, five days on and then five days off. During his 12 hour shift, Mr. Svendsen would remain at the operations base, together with two flight nurses, ready to respond to a telephone call. The operations base, a three bedroom house, was located about two or three miles from the airport. When off duty during his five days on, Mr. Svendsen stayed in Parker, Arizona in a rented room.

At the start of his duty shift, Mr. Svendsen would go to the Parker Airport and preflight the aircraft. Part of the preflight procedure involved checking the airplane logbook for any known malfunctions. Then, back at the operations house, Mr. Svendsen would obtain current local weather information and stay in contact with a flight service station by computer or telephone. The flight service station for Parker, Arizona is located in Prescott, Arizona. The Parker Airport has neither a control tower nor a flight service station. Usually, shortly after take-off, Mr. Svendsen would establish radar contact with Los Angeles Center or Albuquerque Center until he made contact with Phoenix Approach. He would perform an instrument take-off and then fly under visual flight rules ("VFR"). The Parker Airport does have a VOR (VHF (very high frequency) Omnidirectional Range) approach with a one mile minimum visibility restriction. However, as an air ambulance pilot, certified under Part 135 of the Federal Aviation Regulations (FAR), Mr. Svendsen could not use that approach since the airport did not have official weather reporting. As a consequence, the weather minimums at Parker Airport for Mr. Svendsen's flying was three miles visibility for landing and a quarter mile visibility for an instrument take-off.

By contract, Air Methods provides flight operation service, an FAR 135 operations certificate, and pilots, for Guardian Air, which is associated with the Flagstaff Medical Center. During a typical response, Flagstaff Dispatch calls the Parker base station and informs Mr. Svendsen that a patient needs to be transported. The dispatcher provides the patient information and the patient arrives at the Parker Airport in an ambulance. As the patient is being transported to the airfield, Mr. Svendsen goes to the airport and waits for the patient's arrival. Mr. Svendsen receives his flight authorization from the dispatcher because Guardian Air owns the aircraft.

On November 3, 2001, Mr. Svendsen was on duty at the base operations house and received a call from the dispatcher. He then proceeded to the Parker Airport to prepare the aircraft for a flight to Phoenix. Typically, Mr. Svendsen checks a computer about every hour for NOTAMs. He did not

see a NOTAM for Parker Airport on that day. Once the dispatcher call comes in, Mr. Svendsen has 30 to 45 minutes to check the weather and NOTAMs again. However, according to Mr. Svendsen, because Parker Airport does not have an official weather report, “you cannot post a NOTAM for Parker.” In his prior year and a half experience flying out of Parker, he never saw a NOTAM for the airport. On November 3, 2001, prior to going to the airport, Mr. Svendsen checked the NOTAMs.

On November 3, 2001, as he was driving from the south to the Parker Airport, Mr. Svendsen believed the visibility due to dust was “between one to two miles.” He arrived at the airfield around 11:00 a.m. on November 3, 2001. As he was preparing the aircraft for flight, he “observed the dust that was taking place” and the airfield “was embedded in a big dust cloud.” The aircraft’s hanger is located about half way down the west side of the 4,000 foot runway (*see CX 7*), offset about 500 to 600 feet. At that time, the winds were calm. Mr. Svendsen believes he took off to the South that day and made a left turn to the east towards Phoenix.

Since Mr. Svendsen had checked the weather prior to his flight and noted the absence of any information about low visibility at the Parker Airport, he became concerned that other pilots flying into the airfield might be unaware of the low visibility. Based on a calm winds weather forecast for the area, pilots might assume the visibility at Parker Airport was unlimited. To the contrary, Mr. Svendsen observed “a lot of dust” and had difficulty breathing. The dust was caused by “dirty cars” driving parallel to the runway. Due to the calm winds, the dust just sat in the air. Shortly after Mr. Svendsen took off and turned east, he observed the airport on his left and saw an oval race track that he has depicted on CX 7. Cars were constantly driving on that track.

In response to the dust problem, Mr. Svendsen called the Prescott Flight Service Station (“FSS”).⁷ He told the weather briefer at the FSS that he would like them to post a NOTAM for Parker Airfield due to the low visibility caused by the dust. The FSS individual responded he couldn’t post a NOTAM for two reasons. First, the car race was not on the airfield itself. Second, Parker Airport did not have any official weather reporting so he couldn’t post a weather NOTAM for the field in the FSS computer. Instead, the person suggested Mr. Svendsen submit a PIREP (pilot in-flight report). The FSS representative also indicated Mr. Svendsen should contact either the airport manager or the local police.

Mr. Svendsen asked one of the persons servicing the aircraft about the base manager and was informed that the base manager would not be back until Tuesday. As a result, Mr. Svendsen called the local tribal police and told them about the dust problem. The police officer indicated they would look into it.

During his flight, Mr. Svendsen found himself too busy in-flight to call in a PIREP to the FSS. After the patient was unloaded in Phoenix and during a 45 minute period while he waited for the

⁷Initially, Mr. Svendsen testified this event occurred after his arrival at Phoenix and while he was waiting for the nurse to return from transporting the patient. Later, upon reflection, Mr. Svendsen set out a slightly different sequence of events.

nurse to transport the patient, Mr. Svendsen called the FSS again to follow up on his earlier conversation which had been rushed due to the arrival of the patient at the Parker Airport.

When Mr. Svendsen flew back to Parker Airport, the visibility had “increased dramatically” and he was able to accomplish a VFR landing. Prior to November 3, 2001, Mr. Svendsen has been flying out of the Parker Airport for about 15 months. He had never seen that type of dust obstruction before.

About a week later, Mr. Svendsen received a call from Mario (Mr. Grajeda), the individual in charge of the pilots at the Parker, Arizona, base operations. Mario told Mr. Svendsen that he had to go to a meeting in Denver, Colorado. Such a trip was unusual. In Denver, he proceeded to the Air Methods’ main office and waited an hour.

When the meeting finally started, Mr. Svendsen saw Mr. Andy McJohnston and several other persons, including the chief pilot and the human resource manager. After Mr. Svendsen sat down, Mr. Johnson said they had decided to terminate him. Mr. Svendsen asked, “Why?” “They said it was because of the incident that happened in Parker on the 3rd and 4th.” Mr. McJohnston indicated that the Indian tribe was very upset about his phone call to the local police and the tribe was not sure they would permit Mr. Svendsen back on the airfield. “They were afraid that they were going to lose the Parker base if I stayed at that airport.” They also mentioned something about a uniform issue. Mr. Svendsen didn’t bother to ask about that stated problem. The portion about the termination lasted about a minute and a half. Afterwards, there was some discussion about how his final pay would be handled. After that meeting, Mr. Svendsen did not fly for Air Methods.

Mr. Svendsen did not know whether Air Methods had a uniform requirement. He had never been informed about such a requirement. At the same time, he did recall that two weeks after he started working someone from Guardian Air called about measurements for a uniform. He gave her the measurements and then never heard anything else about it. Some Air Methods pilots wore uniforms; other pilots did not.

As remedies, Mr. Svendsen is seeking back pay and reinstatement. After his termination, Mr. Svendsen was unemployed about three months. Then, for two and a half months, Mr. Svendsen earned \$2,000 a month as a flight instructor. At the time of the hearing, he was the chief flight instructor at the Glendale Airport earning about \$2,500 a month.

[Cross examination] After Mayo lost its contract, Mr. Svendsen resigned and was out on leave about a month before Air Methods took over the contract.

As far as Mr. Svendsen understood, he was an employee-at-will with Air Methods. At the same time, Mr. Svendsen believed he had a verbal contract that if he completed the month and half training, he would have permanent employment. He believes the chief pilot, Mr. Wheeler, stated the employment would be long term. He received a conditional offer of employment based on completion of the training.

Mr. Svendsen has an IFR (instrument flight rules) rating. With that rating he could do IFR departures from Parker Airport, even though he didn't file an IFR flight plan. However, there were limitations on the approaches. The airspace was uncontrolled below 10,000 feet. If an official weather report is not available, a pilot may rely on his own observations for determining whether to make an IFR departure. An approach is different because you can be a couple hundreds of miles from the destination airport. Air Methods requires an IFR departure and an IFR flight plan if necessary.

Prior to departure, as part of his job, Mr. Svendsen would call the dispatcher of Flagstaff Medical Center, or traffic coordinator ("TC"), with the estimated take off time. Or, a nurse make a radio call after lift off. When they were 20 minutes from their destination, either the pilot or the nurse would again contact the dispatcher. Basically, every time Mr. Svendsen took a plane out on a mission or test flight, he called the TC. "We always keep TC informed about anything that's going on." He never took an aircraft out without calling TC first, which was a job requirement. The Air Methods' pilots had to contact Guardian Air TC. If something was wrong with the aircraft, then Guardian TC would contact the appropriate mechanic. If an aircraft irregularity occurred, Air Methods and federal regulations required putting the discrepancy in the aircraft log book prior to going off duty.

Mr. Svendsen did take an aircraft on a test flight and then grounded it due to irregularities. He didn't write up the problem because the local mechanic corrected the problem within a short time. So there was no need to annotate the problem. If the problem had been uncorrected and Mr. Svendsen had departed off duty, he would have recorded the problem. Since a test flight is without passengers, Mr. Svendsen believes those flights are governed by Part 91 rather than Part 135 of the FAR. Air Methods requires documentation of mechanic irregularities that occur when flying under Part 135 and not Part 91. Even though Air Methods paid his salary as a pilot, on a test flight, Mr. Svendsen believed he was flying for Guardian Air (which owns the aircraft) under Part 91 and not Air Methods under Part 135.

On November 3, 2001, Mr. Svendsen did not contact anyone at Air Methods. Mr. Svendsen was not forced to fly in an unsafe condition.

When Mr. Svendsen made a follow-up call to the tribal police after returning to Parker Airport, he was told that they had watered the track with a water wagon. And, upon his return to Parker Airport, after about two to three hours in Phoenix, he did notice improved visibility.

The oval rack track was parallel to the 4,800 foot runway. The cars just went round and round. On that day, he didn't observe any other carriers operating out of Parker Airport. He did not see any WW II aircraft being displayed that day. He never spoke to the airport manager that day. He did not speak to Mr. Kelly, the airport manager, that weekend.

On November 3, 2001, Mr. Svendsen checked several NOTAMs but did not see one for Parker Airport.

About a day or two after November 3, 2001, Mario asked Mr. Svendsen if he had called the tribal police on the weekend. Mr. Svendsen said, "Yes."

When Mr. Svendsen flew to Denver, he did not know the purpose of the meeting. After arriving on time and waiting two hours, mostly in a classroom, Mr. McJohnston called him into the meeting and terminated him. Mr. McJohnston told him Guardian Air was concerned they would lose the Parker Airport business. The meeting lasted a total of three minutes. Mr. Svendsen was not separated for: poor interpersonal skills, failure to follow company policy, refusal to wear a uniform, and refusal to follow expense report procedures.

Mr. Svendsen never referred to Mr. Grajeda as a "young punk."

Mr. Svendsen received no written document concerning his termination. He did not tell Air Methods they couldn't fire him because of his safety complaint.

Mr. Svendsen has 16 years experience as a pilot. He is familiar with the FARs. After his termination, Mr. Svendsen became aware of the AIR 21 employee protection provisions.

Although Mr. Grajeda did not remind him about wearing a uniform, he did receive some forms about uniforms from Mr. Grajeda. But the copy was unreadable so Mr. Svendsen couldn't fill it out. When his uniform didn't arrive, he didn't call because other pilots were still waiting for their uniforms too.

Mr. Svendsen did experience a problem with the submission of an expense report. The report was returned because it did not bear the signature of his supervisor. The expense involved the fuel for a tug which is used to move the aircraft. He forgot to get the requisite signature.

Mr. Svendsen wrote a letter to the chief pilot, Mr. Wheeler, stating that he would not carry expenses for Air Methods in the future. He was ultimately reimbursed for the \$175 expense. He also informed Mr. Wheeler that he was not a mechanic because he didn't know what was wrong with the tug. The tug, a small eight horse power vehicle used to pull the aircraft out of the hanger, kept stalling. He contacted TC about the problem and was told to take care of it. So he had a repairman come out and fix it. Mr. Svendsen then paid the bill and sought reimbursement. Because Mr. Grajeda is the supervisor he should have been informed of the mechanical problems. He tried to call Mr. Grajeda but he was off duty. So, Mr. Svendsen contacted TC. Mr. Svendsen was aware Mr. Grajeda had a pager but he didn't think to call it.

Mr. Svendsen did not have a problem taking directions from Mr. Grajeda.

Mr. Svendsen attempted to find Herbert, the other pilot also terminated by Air Methods, but was unsuccessful.

There were about three or four people present at the Denver meeting. Mr. Svendsen believes he was a professional pilot and he never raised his voice or had a temper tantrum. He neither argued

with customers or the flight nurses. If someone claims otherwise, the person may be afraid and attempting to cover up something. Indirectly, Air Methods had a business interest with the local tribe because they provided pilots for Guardian Air which has an air ambulance business with the local tribe.

On November 3, 2001, prior to his departure from Parker Airport, Mr. Svendsen did not see either police or the fire department.

[Re-direct examination] On one occasion, Mr. Svendsen did call the TC about insufficient fuel for the tug and was told to go buy some gas. Because the tug belongs to Guardian Air, he would have not had the repair reimbursement problem if he had gone directly to Guardian Air. Instead, he just took all the receipts and mailed them to Air Methods in Denver.

Mr. Svendsen didn't know the uniforms were mandatory. He was waiting for the company to provide a uniform.

[Re-direct examination (second day of the hearing)] In the spring of 2001, prior to Air Methods taking over the contract, Mr. Svendsen occasionally would give the next door neighbor's cat some milk outside. One of the base managers was concerned about the cat jumping on his car and scratching it. So they agreed not to feed the cat anymore. Mr. Svendsen never kept a cat in the base operations facility while he was employed by Air Methods.

Mr. Svendsen knew several months in advance that Mayo Aviation had lost its contract and Air Methods would take over. Noone at Mayo Aviation presented a choice to him. He quit a month early looking for opportunities to fly since his flying time with Mayo Aviation was limited.

Mr. Svendsen did not have the requisite 1000 flying hours in turbo propeller aircraft when he first considered applying to fly with Air Methods. Later, the company apparently lowered that requirement and Air Methods accepted his employment application.

When Mr. Svendsen worked for Mayo Aviation, a credit card for fuel was kept on a "pin board." After Air Methods took over and the tug needed fuel, Mr. Svendsen did not find the card and assumed the fuel arrangement no longer existed. So, he tried to call the base manager. When that effort failed, Mr. Svendsen called the dispatcher who told him to get a few gallons of gas for the tug.

[Cross examination (second day of the hearing)] The June 20, 2001 Conditional Offer of Employment (RX 6), which Mr. Svendsen signed, states the Air Methods is an "at will" employer. Mr. Svendsen also signed the employment memorandum (RX 7) and understood it.

RX 9 is the note Mr. Svendsen "obtained" from Mr. Grajeda. The note did not prohibit emergency purchases. Rather, he understood the note to require obtaining Mr. Grajeda's approval for expenses prior to submitting the expense report to Denver. As a result, Mr. Svendsen was aware

that Mr. Grajeda had some issues with his expense reports. Mr. Svendsen sent the notes to Mr. Wheeler to inform him that unless he was reimbursed for his expenses, he would no longer carry expenses for the company. He eventually received reimbursement when he was terminated. (After failing to recall when he sent his letter to Mr. Wheeler, and some specific questioning,) Mr. Svendsen acknowledged RX 20 is the envelope he used to send his letter to Mr. Wheeler. The envelope is postmarked November 3, 2001.

At his Denver meeting, Ms. Baily, Mr. McJohnston and Mr. Wheeler were present.

Mr. Svendsen went through the human resources training as part of his initial orientation. He signed an acknowledgment that he had received the company's production work force policies (RX 12) as part of that process and understood its contents. At the time he signed the form, June 29, 2001, Mr. Svendsen also understood that he needed a uniform. However, that impression changed because he never saw any pilots in uniform. He never saw Mr. Grajeda or Hebert, the other pilot, in uniform. He also never received any readable uniform forms. He read the policy information but doesn't recall its contents.

Initially, Mr. Svendsen stated he did not send his letter (RX 12) to Mr. Freeman as a response to Mario's letter to Mr. McJohnston because he wasn't informed Mario was mailing letters to Mr. McJohnston. However, when presented with his letter containing his statement that he had read Mario's report, Mr. Svendsen agreed that he did read Mario's letter and his correspondence to Mr. Freeman was a response.

The medical crew at Kingman did not ask Mr. Svendsen to wait for them. Because something was wrong with the aircraft, he contacted TC and they instructed him to return to Parker and change with the day pilot. Mr. Svendsen did not document the problem. The medical crew was probably surprised because the dispatcher forgot to tell them to wait for the crew. Mr. Svendsen would have waited for the medical crew if he been instructed to do so.

RX 18 indicates that any time a pilot finds a mechanical discrepancy, he must document the problem. That is Air Methods' policy. However, Mr. Svendsen didn't record the problem because the plane was still airworthy.

Mr. Grajeda only told Mr. Svendsen that he had to go to Denver. He did not tell him the purpose of the meeting. Mr. Svendsen received short notice of the meeting. The events concerning the cat, tug fuel purchase, expenses reports, and interpersonal reactions all occurred prior to the Denver meeting.

Respondent's Evidence

Documentary Exhibits

RX 1 - Affidavit of Michael J. Wheeler, signed February 14, 2002. Mr. Wheeler is the chief pilot for Air Methods and works at its corporate headquarters in Denver, Colorado. As chief pilot, Mr. Wheeler supervised Mr. Jan Svendsen who was based out of Parker, Arizona. Mr. Svendsen provided flight services under a contract between Flagstaff Medical Center and Air Methods.

Air Methods terminated Mr. Svendsen's employment on November 12, 2001 for the following reasons: 1) continued refusal to wear the required uniform; 2) his refusal to comply with company procedures; 3) repeated violations of company policies; 4) poor interpersonal skills with medical crews, co-workers, supervisors, colleagues, and customers; 5) argumentative demeanor towards customers, authorities, and his superiors; 6) refusal to use and follow the proper chain of command; 7) disregard of the instructions of a direct supervisor, the base manager; and, 8) insubordination.

Mr. Wheeler was present when Mr. Svendsen was informed that he was being terminated due to the reasons noted above. Also, present were Ms. Mary Marley, Mr. Andy McJohnston, Ms. Kathy Bailey, and Mr. Jeff Freeman.

Prior to the meeting, Mr. Wheeler was informed of the various reasons for Mr. Svendsen's separation. He also was personally aware of one letter that led to some of the reasons for dismissal. Although not his direct supervisor, Mr. Wheeler received a certified letter, dated November 3, 2001, from Mr. Svendsen in which he angrily discussed not wanting to obtain prior approval for reimbursable expenses. Mr. Wheeler did not know the circumstances that caused Mr. Svendsen to write the letter. Mr. Svendsen also set out the duties he would and would not accomplish. Under Air Methods' chain of command, Mr. Svendsen should have taken the issue to his immediate supervisor, Mr. Grajeda. In Mr. Wheeler's opinion, Mr. Svendsen's letter was rude, inappropriate, disrespectful, and unprofessional.

Mr. Wheeler was also aware of Mr. Svendsen's failure to comply with Air Methods' request that he wear a uniform pursuant to the company's contract with Flagstaff Medical Center. By failing to wear the uniform, Mr. Svendsen violated the provisions of that contract and Air Methods' company policy.

About November 8, 2001, an employee of Flagstaff Medical Center, who is Air Methods' customer, complained about Mr. Svendsen's behavior. According to the individual, Mr. Svendsen degraded Air Methods, called his immediate supervisor a "punk," and degraded other Air Methods personnel. The customer also expressed concern that while others, including himself, wore uniforms, Mr. Svendsen refused to wear a uniform. Finally, Mr. Svendsen's negative attitude affected the customer and others.

Concerning Mr. Svendsen's report of a drag race to the tribal police, Mr. Wheeler believes the event was actually an annual 400 mile off-road race, covering a 90 mile circuit, sanctioned by the local tribe. According to the Parker Airport Manager, a NOTAM about the event was posted on November 3, 2001 at the airport and the FAA. The NOTAM advised pilots of the event and potential for low visibility. Had Mr. Svendsen made the required NOTAM inquiries, he would have become

aware of the event. Noone at Air Methods required Mr. Svendsen to fly on November 3, 2001. Since the race occurred on tribal land, Air Methods had no authority to intervene or halt the race.

Mr. Wheeler did not discipline Mr. Svendsen for his November 3, 2001 report and he is not aware of any person who disciplined him for the report. His report to the tribal police was not a basis for his termination. Air Methods would have terminated his employment despite the report.

RX 2 - Affidavit of Ms. Kathy Bailey, signed February 14, 2002. Ms. Bailey is the Human Resource Director for Air Methods. She works in Denver, Colorado.

Mr. Svendsen was an Air Methods' fixed wing pilot based at Parker, Arizona. He provided flight services under the Air Methods' contract with Flagstaff Medical Center. During his employment, Air Methods repeatedly counseled Mr. Svendsen for violations of company policy and failure to follow company procedure. Despite these efforts, Mr. Svendsen continued to refuse to follow company policy and procedure.

On November 12, 2001, Air Methods terminated Mr. Svendsen for the following reasons: 1) continued refusal to wear the required uniform; 2) refusal to comply with company procedures; 3) repeated violations of company policies; 4) poor interpersonal skills with medical crews, co-workers, supervisors, colleagues, and customers; 5) argumentative demeanor towards customers, authorities, and his superiors; 6) refusal to use and follow the proper chain of command; 7) disregard of the instructions of a direct supervisor, the base manager; and, 8) insubordination.

At the termination meeting, Ms. Bailey, Ms. Mary Marley, Mr. Mike Wheeler, Mr. Andy McJohnston, and Mr. Jeff Freeman told Mr. Svendsen he was being terminated for the above stated reasons.

Mr. Svendsen's infractions of company policy and procedures included his refusal to wear a uniform, his unauthorized flights, and his defiance and insubordination to his superiors, co-workers, and colleagues.

As an example, Mr. Svendsen sent a certified letter to Mr. Wheeler complaining about Air Methods' request that he seek prior approval for expenses. Mr. Svendsen also informed Mr. Wheeler of the duties that he would and would not do. These issues should have been submitted to his immediate supervisor, Mr. Grajeda. When Ms. Bailey later read the letter, she found its tone inappropriate, disrespectful, and unprofessional.

Mr. Svendsen refused to follow proper procedures for approval of his expenses reports. He did not obtain the requisite supervisor approval. Instead, Mr. Svendsen bypassed his supervisor and submitted the reimbursement request to non-designated persons thereby delaying Air Methods' ability to properly process the expense report.

On November 8, 2001, a Flight CEP (certified emergency paramedic) complained that Mr.

Svendsen openly, and before co-workers and the customer, defamed Air Methods and his supervisor, calling him a “punk.” He also degraded other Air Methods’ personnel.

After Air Methods had learned of Mr. Svendsen’s difficulties with interpersonal relationships, the company attempted to counsel him. However, Mr. Svendsen was unresponsive and reacted in an argumentative manner.

On one occasion in Kingman, Arizona, Mr. Svendsen abandoned his medical crew at that location despite their requests that he wait for them to enable their transport back to Parker, Arizona. When he departed, Mr. Svendsen also violated company and safety policies by not obtaining clearance or permission for the flight.

Shortly after November 3, 2001, Ms. Bailey became aware of Mr. Svendsen’s report to the tribal police. The race was sponsored and sanctioned by the Indian tribe. The 400 mile off-road race occurs each year and was authorized by local authorities and the Bureau of Land Management. Several hundred cars were involved and the course was a 90 mile track. A NOTAM about the race was posted at the Parker Airport. The NOTAM advised airmen of the event and potential for low visibility. Air Methods did not require Mr. Svendsen to fly during the tribal event. Since the race occurred on tribal land, Air Methods had no authority to intervene. Air Methods has not been cited for violating any FAA regulation in connection with the November 3, 2001 events.

Air Methods did not discipline Mr. Svendsen for his November 3, 2001 report. The company would have terminated Mr. Svendsen despite the complaint.

RX 3 - Affidavit of Mr. Mario Grajeda, signed but not dated. Mr. Grajeda is currently employed as the base manager at Parker, Arizona for Air Methods. In that capacity, he worked with, and supervised, Mr. Svendsen, who provided flight services under a contract between Air Methods and Flagstaff Medical Center.

On November 12, 2001, Air Methods terminated Mr. Svendsen for the following reasons: 1) continued refusal to wear the required uniform; 2) refusal to comply with company procedures; 3) repeated violations of company policies; 4) poor interpersonal skills with medical crews, co-workers, supervisors, colleagues, and customers; 5) argumentative demeanor towards customers, authorities, and his superiors; 6) refusal to use and follow the proper chain of command; 7) disregard toward Mr. Grajeda, his direct supervisor and base manager; and, 8) insubordination.

Mr. Grajeda made repeated requests to Mr. Svendsen to wear his uniform. He also informed Mr. Svendsen that his refusal violated company policy. Mr. Svendsen continued to refuse to wear a uniform.

Mr. Svendsen also refused to follow proper procedures for expense reports. He ignored Mr. Grajeda’s instruction to obtain prior approval for certain items. On occasion, Mr. Svendsen bypassed Mr. Grajeda and submitted his unauthorized report to individuals who did not supervise him or were

not charged with overseeing his work and expense reports. He also refused to follow Air Methods' chain of command procedure and caused delays by submitting paperwork directly to corporate offices in Denver. Mr. Svendsen appeared resentful of Mr. Grajeda's supervision.

About November 8, 2002, Mr. Grajeda learned that a Flight CEP, an employee of Air Methods' customer, Flagstaff Medical Center, complained about Mr. Svendsen's behavior. According to the report, Mr. Svendsen had openly referred to Mr. Grajeda as a "punk." He also degraded other Air Methods' personnel and generally "defamed" Air Methods. During his employment, Mr. Grajeda repeatedly counseled Mr. Svendsen about his poor interpersonal skills and argumentative interaction with co-workers, supervisors, colleagues and customers.

Mr. Svendsen also violated company policy when he abandoned a medical crew in Kingman, Arizona, despite their request that he not leave. Prior to his departure, Mr. Svendsen failed to obtain flight approval or proper clearance for his return flight to Parker, Arizona.

Shortly after November 3, 2001, Mr. Svendsen sent a certified letter to the company chief pilot indicating he did not have time to obtain prior approval for company expenses. He set out his view of appropriate duties and highlighted other work he did not wish to perform. Those issues should have been presented to Mr. Grajeda first. Additionally, the chief pilot did not directly supervise Mr. Svendsen and was unable to place the letter in context. The tone of the letter was inappropriate and insubordinate.

On several occasions, Mr. Svendsen "unilaterally" took an aircraft flying without obtaining the proper flight authorization. He violated company policy and safety regulations.

Mr. Grajeda was aware of the circumstances surrounding the November 3, 2001 auto race. The event was not a drag race. Instead, it was a yearly, duly authorized 400 mile road race which occurred mostly on tribal land. Air Methods did not have any authority to intervene. A NOTAM was posted at Parker Airport advising pilots of the event and potential for low visibility. Neither Mr. Grajeda nor Air Methods required Mr. Svendsen to fly that day, November 3, 2001. Air Methods advises its pilots to act conservatively in their decisions and err on the side of safety. Mr. Grajeda did not discipline Mr. Svendsen for this event.

Air Methods would have terminated Mr. Svendsen's employment despite his complaint.

RX 4 - Affidavit of Mr. Bailes Kelly, signed but undated. Mr. Kelly is a licensed pilot and airport manager at Parker Airport, who oversees flight operations. He is not an employee of Air Methods. Three carriers, including Air Methods, operate out of the airfield.

On November 3, 2001, Mr. Kelly was on duty as the acting airport manager. On that day, an annual, 400 mile off-road race was held. Most of the 90 mile circuit is not near the airport. The race is authorized and sanctioned by the local tribal and the Bureau of Land Management. On November 3, 2001, a NOTAM was posted with the FAA and at the airport informing pilots of the

potential for low visibility due to the race. At about a distance of 20 nautical miles, and about 8 minutes flying time, Havasu Airport is the closet airport to the Parker Airport. On November 3, 2001, all three carriers operated out of Parker Airport without any problems and no re-routes were requested. In addition, three WW II fighters were exhibited.

Mr. Kelly spoke with Mr. Svendsen on November 3, 2001 about the tribal car race. Mr. Svendsen told Mr. Kelly that he was unaware of the car race and had called the tribal police and the city mayor to complain. Mr. Kelly informed Mr. Svendsen that he should have known about the race due to the NOTAM. He reminded Mr. Svendsen that the local authorities had approved the race. If he felt it was unsafe to fly, then Mr. Svendsen could change his flight plan. Finally, not seeing any impropriety, Mr. Kelly told Mr. Svendsen that he should take his concerns to Air Methods. Mr. Kelly recalls Mr. Svendsen's demeanor as aggressive and domineering. Working with him was difficult.

No investigation was conducted about the race and the FAA did not issue any citation.

RX 5 - Affidavit of Mr. Richard Titus, signed but not dated. Mr. Titus is a certified medical paramedic employed by Guardian Air. He was based in Parker, Arizona and flew with Mr. Svendsen.

On November 8, 2001, Mr. Titus presented a formal complaint about two Air Methods' pilots, including Mr. Svendsen, to Ms. Jeanine Hanson in Flagstaff. Mr. Titus had observed Mr. Svendsen participate in several open conversations in front of other Guardian Air employees downgrading Air Methods, Ms. Hanson, and Mr. Grajeda. On more than one occasion, Mr. Titus heard Mr. Svendsen refer to Mr. Grajeda as a "punk." Mr. Svendsen constantly expressed his dissatisfaction with Air Methods. Additionally, Mr. Titus was one of the individuals that Mr. Svendsen "downgraded." Mr. Titus believed Mr. Svendsen's actions were "disrespectful, disparaging and insubordinate."

According to Mr. Titus' belief, all pilots, including Mr. Svendsen, and employees of Guardian Air are required to wear uniforms. Mr. Svendsen never wore the requisite uniform. Mr. Titus believes Mr. Svendsen was aware of the uniform requirement because he stated, "That punk just told me I had to wear a uniform." The clothes Mr. Svendsen did wear were unprofessional and inappropriate. Due to Mr. Svendsen's negative attitude, Mr. Titus found it difficult to work with him.

After his meeting with Ms. Hanson, Mr. Titus contacted Mr. Grajeda and advised him about his formal complaint to Ms. Hanson. Although Mr. Titus flew with Mr. Svendsen for several months, he made his complaint on November 8, 2001 because he had "seen enough." He felt Mr. Svendsen's supervisors should be advised of his work place conduct.

RX 6 - Conditional offer of employment to Mr. Svendsen, dated June 20, 2001. Air Methods offered Mr. Svendsen employment as a pilot of a King Air E90, stationed at Parker, Arizona, conditioned upon his fulfillment of numerous medical and qualification prerequisites and successful completion of training. His monthly salary was set at \$3,304.59 plus \$400 a month in geographic

differential pay. In exchange, Mr. Svendsen agreed to work a minimum of 12 months. If he voluntarily quit earlier than 12 months, he agreed to reimburse the company for training costs. The employment relationship was “at will” and either party could terminate the employment relationship, with or without cause, with or without notice. Ms. Mary Marley, for Air Methods, and Mr. Svendsen signed the agreement.

RX 7 - Memorandum of Understanding concerning temporary employment, dated July 27, 2001. During the 30 days of training, Mr. Svendsen was a temporary employee of Air Methods, and again within an “at will” employment relationship.

RX 8 - Letter from Mr. Titus to Mr. Grajeda, dated November 14, 2001. In the letter, Mr. Titus informed Mr. Grajeda that he had presented a formal complaint about Mr. Svendsen and another person named “Herb” (Mr. Herbert Caceris) to Ms. Hanson. According to Mr. Titus, over that last few shifts, he observed both Mr. Svendsen and Herb act in an unprofessional manner, degrading Guardian Air and Mr. Grajeda. Frequently, Herb stated he had friends in high places in the FAA and the practice of “dropping medical crews off” would end. Mr. Titus also presented an un-attributed quote as follows: “that’s what you get with a 29 year old punk that thinks he runs things.” Mr. Titus’ other concerns were Mr. Svendsen’s failure to wear a uniform. Instead he only wore a yellow shirt and faded blue pants “that he sleeps in.” Both Mr. Svendsen and Herb made “constant calls to Denver and the FAA.” Mr. Titus believed their conduct was “very unprofessional” and affected the attitude of the entire medical team.

RX 9 - Undated, handwritten note signed by “Mario.” The document indicates an unnamed person may buy a calculator. But if it was lost, Air Methods would not pay for a new one. Mario indicated that he was to see any expenses which he would sign and send to “Andy.” Finally, Mario wrote, “Tug. Noone approve[d] any expenses for the tug, \$3 for a spark plug and \$50 for labor. You could have installed it yourself.”

A second, undated, and unsigned note informs “Jan” that “Andy” returned the receipts. The note indicates that the person writing the note must see the receipt and approve the purchase. Additionally, the notes advises that if fuel is needed, the crew has an account at Parker. Finally, the note indicates that Air Methods will only pay for two calculators.

RX 10, RX 12 and RX 20 - Letter to Mr. Michael Wheeler from Mr. Svendsen, undated (certified mail envelope from Mr. Svendsen to Mr. Wheeler’s attention, postmarked November 3, 2001). Mr. Svendsen informed Mr. Wheeler that he mailed receipts for about \$170 while working at Parker, Arizona. The expenses included five gallons of fuel for the tug. Mr. Svendsen had been informed that he would not be reimbursed for that expense because he should have set up an account with the crew. Mr. Svendsen stated he needed the fuel right away and did not have time to seek approval. Mr. Svendsen took the fuel back and indicated that if Mario wants an account set up, it was Mario’s job to do and he should inform the pilots about the account.

Mr. Svendsen indicated that he did have Mario’s approval to purchase two calculators; one for the base and one for the airplane. However, when the plane was shifted to another location, the

calculator went with the plane, so Mr. Svendsen bought a third calculator for the new plane. All the calculators were for the company and not his personal use. Mr. Svendsen claims he talked to Mario prior to the purchases and he approved them.

When the tug broke, Mr. Svendsen contacted a local repair shop that had been used for many years. He needed the tug repaired right away and did not have time to seek approval. Mr. Svendsen emphasized, "I AM NOT A MECHANIC AND IT IS NOT MY JOB TO CHANGE SPARK PLUGS."

Finally, Mr. Svendsen indicated that he would no longer carry any expenses for Air Methods.

RX 11 and RX 12 - Mr. Mario Grajeda's letter to Mr. Jeff Freeman in Englewood, Colorado, on a incident which occurred on September 14 and September 15. On September 14, Herb experienced problems with the pressure system on N228RA dumping. Herb then told Mr. Svendsen. The next day, on September 15, Mr. Svendsen flew the medical crew to Kingman, Arizona and experienced the same problem. He informed TC, the medical crew, and the mechanic on call. The medical crew told Mr. Svendsen to stay at Kingman because they knew they would be returning to Parker, Arizona. However, Mr. Svendsen took off and returned to Parker, Arizona without contacting TC until he had arrived at Parker, Arizona. The person in TC told Mr. Svendsen he should not have departed Kingman. According to Mario, Mr. Svendsen is aware of the proper procedures. He also told Herb to report any mechanical problems that may exist.

RX 12- Air Methods' employment record for Mr. Svendsen. Mr. Svendsen's application for employment with Air Methods is dated June 18, 2001. According to his resume, Mr. Svendsen had about 2,500 flying hours and an airline transport pilot ("ATP") license. He worked for Mayo Aviation from March 2000 to March 2001. The preferred qualifications for a fixed wing pilot with Air Methods was 3000 flying hours and an ATP license.

Mr. Svendsen was hired as a fixed wing pilot for Air Methods at a monthly salary of \$3,304.59 plus \$400.

On June 29, 2001, Mr. Svendsen signed a receipt and acknowledgment form indicating that he had received Air Methods' *Productive Work Environment/Behavior of Employees Policy*. Mr. Svendsen indicated his understanding that failure to comply with the policies might result in termination.

The performance section of Mr. Svendsen's personnel record includes Mr. Grajeda's letter about the September 14 incident. In response, Mr. Svendsen wrote to Mr. Freeman denying that Herb had ever informed him of the pressure system problem. Additionally, Mr. Svendsen did contact TC prior to his departure from Kingman, Arizona. Mr. Svendsen flew back to Parker so that Mr. Grajeda, the day pilot, could take over and fly back to Kingman to pick up the medical crew on his

way to Flagstaff.

The performance section also includes another letter by Mr. Grajeda to Mr. Andy McJohnston about an incident in August 2001. During a flight in N228RA (the King Air E90), Mr. Grajeda could not engage the autopilot with normal settings. Upon landing, he presented the problem to a mechanic who informed him that if a knob was turned two additional notches, the autopilot would work. On his next flight in the aircraft, Mr. Grajeda followed the mechanic's suggestions and the autopilot engaged successfully. Later, Mr. Grajeda passed the instructions about the autopilot to Mr. Herb Caceris. On August 31, 2001, Mr. Caceris flew the aircraft and upon return informed Mr. Svendsen about the autopilot settings. After informing a mechanic but without approval, Mr. Svendsen took the aircraft for a test flight and grounded the plane when he landed due to an inoperative autopilot. Although he was apparently aware of the necessary knob adjustments to engage the autopilot, Mr. Svendsen did not want to fly the aircraft until the normal settings engaged the autopilot.

Also in his response to Mr. Grajeda's September 2001, Mr. Svendsen expressed his concern about the proper reporting and documenting of aircraft problems. As an example, he "took over" an aircraft with an inoperative autopilot.

On November 12, 2001, Mr. Svendsen was dismissed as an Air Methods' pilot.

RX 14 and RX 15 - On November 28, 2001, a representative of the Colorado River Indian Tribes Police Department informed Mr. Svendsen that no report would be written for the incident he reported on November 3, 2001. Instead, the representative attached a copy of the department's November 3, 2001 radio log which records Mr. Svendsen's call to the police department at 9:19 a.m. Mr. Svendsen reported that the dust caused by the race was becoming bad and he was concerned about visibility.

RX 16 - On December 11, 2001, Mr. Lister of the Prescott Flight Service Station informed Mr. Svendsen that the person on duty the weekend of November 3 recalled receiving a call from an aircraft located at Parker Airport about visibility restrictions. The individual was informed that the FSS could not take the report unless it was an airborne pilot report. Additionally, because the FSS was not involved with the race, it could not issue a NOTAM. The FSS representative suggested the caller contact the local police or airport manager.

RX 17 - Mr. Svendsen's AIR 21 complaint, dated December 21, 2001. Mr. Svendsen reported that while working as an air ambulance pilot at Parker, Arizona, on November 3, 2001, he observed that a dirt race 400 feet off the runway was causing a reduced visibility between 1/4 to 1 mile due to dust. He reported the problem to the local police due to his concern for other pilots' safety. One week later, Air Methods terminated his employment due to his call to the police.

RX 18 - Excerpts from the Air Methods' operations manual, dated August 2000, states a pilot is accountable to the base and operations managers. Pre-flight, the pilot in command must ascertain all relevant information pertaining to the flight, including a review of the NOTAMS. Further, when

a pilot finds a mechanical deficiency, he or she must document the discrepancy in the aircraft logbook.

RX 19 - The Airframe logbook for N228RA indicates that on July 31, 2001, Air Methods assumed the maintenance responsibility for N228RA from Mayo Aviation.

RX 20 - Certified letter envelope from Mr. Svendsen to the Attention of Mr. Wheeler, postmarked November 3, 2001.

Sworn Testimony

Mr. Michael Wheeler (TR, pages 158 to 228)

[Direct Examination] An experienced aviator, Mr. Michael Wheeler is the chief pilot for Air Methods. As the chief pilot, he oversees all flight aspects of Air Methods' operation. Air Methods operates about 30 bases with 50 aircraft and about 170 pilots. In that regard, each pilot reports to the base manager, who covers the day-to-day issues. At the same time, all the pilots essentially work for Mr. Wheeler. The structure was explained to Mr. Svendsen. In his case, Mr. Grajeda was the base manager.

Although the FAA only requires documentation of air-worthiness problems associated with flights under Part 135, the Air Methods' operations manual (RX 18) requires all airworthiness issues to be document. Air Methods makes no distinction between Part 135 and Part 91 flights. A copy of the operations manual is provided for each aircraft and at the base locations. Mr. Wheeler believes Mr. Svendsen received the information contained in the operations manual. When he reviewed the log book entries for N228RA (RX 19), Mr. Wheeler did not find any discrepancies, specifically concerning the autopilot, entered by Mr. Svendsen.

Under Air Methods' policies, a pilot should first approach his base manager with any problems. The company also has a process for completing expense reports, which require the base manager's signature and approval.

The company puts all newly hired pilots through a training program that addresses FARs, the operations manual, flight safety, and company personnel policies and benefits. The program also includes an in-briefing that covers the uniform requirement. Mr. Svendsen went through this training.

Air Methods picked up the contract with Guardian Air on August 1, 2001. The contract specifically requires pilots to wear uniforms and display a professional manner. Additionally, under the terms of their contract (JX 1), Guardian Air and not Air Methods was responsible for flight operations jet fuel. It does not specifically mention tug fuel.

Mr. Wheeler had received a phone call from Ms. Hanson of Guardian Air asking him to give Mr. Svendsen a second chance. He had worked for Mayo Aviation before it dissolved. Ms. Hanson

believed he had been treated unfairly by Mayo Aviation and asked Mr. Wheeler to consider hiring him. Mr. Wheeler, Mr. Jeff Freeman, the operations manager, Ms. Marley from Human Resources, and others, interviewed Mr. Svendsen. Mr. Wheeler made the decision on the conditional offer of employment.

Under their contract with Guardian Air, Air Methods is responsible for aircraft maintenance, even though Guardian Air owned the aircraft. As a result, any maintenance issues were suppose to be directed to Air Methods personnel, such as Mr. Grajeda or the duty mechanic.

Mr. Wheeler counseled Mr. Svendsen about his performance on August 9, 2001. Mr. Svendsen had been involved in a verbal confrontation with another pilot during a training flight concerning a particular maneuver. Mr. Svendsen's approach may have appeared "gruff or aggressive." He was advised to be more careful and be on guard against that attitude. Air Methods does not condone an aggressive attitude among its pilots and the initial training program covers proper crew conduct.

A few days before the November 12, 2001 meeting with Mr. Svendsen, Mr. Wheeler received Mr. Svendsen's letter about the tug fuel (RX 10) and was confused because it involved administrative issues, which should have been handled by the base manager, rather than technical or operations issues. He was also "put off" by its insubordinate and unprofessional tone to the extent that he was inclined to terminate him over the letter. Mr. Wheeler is "not in the habit of having line pilots tell [him] what they will and will not do." Mr. Wheeler discussed the letter with Mr. Andy McJohnston and shared his thoughts about the tone of the letter. Mr. McJohnston indicated he was handling the issue through an expense report.

Mr. Wheeler had also been advised about Mr. Svendsen's uniform issue and talked to Mr. McJohnston. He never saw any Air Methods pilots not wearing a uniform.

On November 12, 2001, Mr. Wheeler met in Denver, Colorado with Mr. McJohnston, operations manager, Mr. Freeman, second operations manager, and Ms. Bailey. He does not recall making Mr. Svendsen wait for two hours. Mr. Wheeler understood the purpose of the meeting was to discuss Mr. Svendsen's behavioral issue. He did not know Mr. Svendsen was going to be terminated. Mr. McJohnston conducted the meeting which lasted longer than a minute and a half. The issues covered at the meeting were Mr. Svendsen's unprofessional letter to Mr. Wheeler, his failure to wear the requisite uniform, his argumentative and confrontational behavior with both co-workers and customers, a stray animal in crew quarters, and "the manner in which the issues around the drag race on . . . the 3rd of November were brought up." Concerning the November 3 incident, they noted that the police and airport management had complained to "our customer." The focus was not on the fact that he called the authorities but "the manner" in which he contacted these people. Specifically, they had concerns about "his tone, confrontational-type behavior," his "aggravated" and accusatory demeanor, and "raised voice."

Concerning this last issue, Mr. Wheeler had heard about the November 3, 2001 incident from

Mr. Grajeda and Mr. McJohnston. According to Mr. Grajeda, the race covered an area outside the boundaries of the airport. There was a NOTAM about the event. Air Methods was not upset about Mr. Svendsen's safety concern. The company wanted such issues presented to the proper authority. However, they also wanted that presentation to be professional. Professionalism is important since Air Methods not only deals with its customers, it also deals with people in the community.

Although the persons at the meeting were not asked to vote on terminating Mr. Svendsen and Mr. McJohnston made that decision, Mr. Wheeler did not disagree. Mr. McJohnston told Mr. Svendsen he was being dismissed due to performance and behavioral issues. Mr. Wheeler believes Air Methods would have made the same decision regarding Mr. Svendsen's employment despite the November 3, 2001 reports by him.

Mr. Wheeler was aware of issues raised by Mr. Titus about Mr. Svendsen's interpersonal behavior. Since the beginning of the contract, Mr. Wheeler had one or two conversations about this behavior with the program director. Those issues were also discussed at the November 12, 2001 meeting.

[Cross Examination] The pilot who discovers a discrepancy is the person who should document the problem. If three pilots fly the aircraft in a row with a problem but no one writes it up, then each pilot had the responsibility to make the required documentation.

Attached to Mr. Svendsen's letter to Mr. Wheeler was a handwritten note by Mario.

Concerning the uniform issue, Mr. Wheeler was only aware of verbal actions by Mr. Grajeda.

Mr. Wheeler was aware that the aircraft in which Mr. Svendsen raised his voice in the August 2001 incident does not have an intercom. However, Mr. Wheeler stated the presentation was that Mr. Svendsen raised his voice more than necessary to overcome the cockpit noise.

When he was hired, Mr. Svendsen met the minimum requirements for a pilot stated in the Air Methods contract with Guardian Air.

[Redirect examination] Mr. Wheeler has no reason to question the information he received about Mr. Svendsen from the base and operations managers.

Mr. Mario Grajeda (TR, pages 228 to 279, and 411 to 435)

[Direct Examination] Mr. Grajeda is a pilot and base manager for Air Methods at Parker, Arizona. He started working for the company when they took over the contract with Guardian Air. Prior to then, Mr. Grajeda had been working for Mayo Aviation about six months. During that period, he has no recollection of Mr. Svendsen.

As the base manager, Mr. Grajeda is assigned to oversee three other pilots. In the summer of 2001, he supervised Mr. Svendsen and Mr. Herb Caceris and was waiting for an additional pilot. He was the pilots' point of contact for any concerns about their daily employment.

The pilots of Air Methods are required to wear uniforms. Mr. Svendsen was told of that requirement. Mr. Grajeda wore a uniform. Mr. Svendsen did not. Due to fitting problems, Mr. Caceris was able to wear only a portion of the uniform. When they were first hired by Air Methods, Mr. Grajeda gave Mr. Svendsen paperwork for uniform measurements. After someone complained about his lack of uniform, Mr. Grajeda left another set of measurement paperwork in Mr. Svendsen's office mailbox. Subsequently, again after hearing that Mr. Svendsen wasn't wearing a uniform, Mr. Grajeda talked to Mr. Svendsen about the uniform. Mr. Svendsen indicated he had ordered a uniform but when Mr. Grajeda contacted the person at Guardian Air who would take the order, she said he had not ordered a uniform. Mr. Grajeda did not confront Mr. Svendsen with that information. Mr. Grajeda received his uniform within three weeks of his order.

Concerning expenses, individuals are required to obtain prior approval from the base manager. Mr. Grajeda received from his supervisor, Mr. McJohnston, expense reports that had been submitted by Mr. Svendsen because they lacked the necessary approval. Absent the necessary signature, processing of the expense report is delayed. Mr. McJohnston returned receipts that he had received from Mr. Svendsen so an expense report could be completed.

Mr. Grajeda wrote the note with the signature "Mario" and the second note with "Andy" at the top (RX 9). Since as base manager, Mr. Grajeda is responsible for keeping an expense budget, he left the notes for Mr. Svendsen concerning his failure to follow proper expense report procedure. In one of the notes, Mr. Grajeda reminded Mr. Svendsen that he did not have to pay cash for tug gas since Guardian Air has provided a credit card for fuel purchase at Parker Airport.

Several times, Mr. Grajeda spoke to Mr. Svendsen about his demeanor and attitude, but "it was difficult to approach him." Sometimes Mr. Svendsen would respond with an opinion. Other times, he did not say anything. Mr. Grajeda does not like confrontation and preferred a calm and professional approach. Almost as soon as Mr. Svendsen started flying for Air Methods, medical crews told Mr. Grajeda about his yelling at the transport coordinator ("TC") while the crew members were trying to sleep at the base.

When Mr. Grajeda went to Colorado for training around September or October, 2001, he spoke to Ms. Bailey about Mr. Svendsen. Specifically, the medical crew told Mr. Grajeda that Mr. Svendsen was allowing stray cats into the base house and feeding them. Since Mr. Grajeda never witnessed the event due to their different schedules, he asked Ms. Bailey about how to question Mr. Svendsen about the situation. Afterwards, Mr. Grajeda talked to Mr. Svendsen about the stray cats. Mr. Grajeda asked Mr. Svendsen to "please" stop the practice if the report was true. He wasn't directing Mr. Svendsen to stop. Instead, Mr. Grajeda was just passing on the complaint. Mr. Grajeda did not think having stray cats in the base house was appropriate because the area is a business place and the crews' medical equipment kept in the house needed to be clean.

As base manager, Mr. Grajeda is responsible for ensuring smooth operations. He is not involved in discipline and does not make any recommendations about discipline. Mr. Grajeda made no recommendation concerning Mr. Svendsen. Rather, he just passed information on to his supervisor, Mr.

McJohnston, or the human resource contact, Ms. Bailey.

In addition to the expense report issues and the stay cats, Mr. Grajeda contacted Mr. McJohnston about an incident when N228RA was placed out of service by Mr. Svendsen. Mr. Svendsen told Mr. Grajeda that he grounded the aircraft due to an autopilot problem. When Mr. Grajeda looked into the circumstances of the grounding, he discovered that neither the mechanic nor Guardian Air were aware that Mr. Svendsen had flown the aircraft. Apparently, Mr. Svendsen flew the plane without permission. That's a problem because someone, either Air Methods or Guardian Air, has to pay for the flight.

Mr. Grajeda also informed Mr. McJohnston and Mr. Freeman (another operations manager) by letter (RX 11) about Mr. Svendsen leaving a medical crew in Kingman even though the crew asked him not to depart. Without contacting TC, Mr. Svendsen flew from Kingman to Parker. He only contacted TC after he arrived at Parker Airport. TC indicated that if he had called prior to departure they would have told him to hold. When Mr. Grajeda arrived at Parker Airport, Mr. Svendsen told him that Mr. Grajeda needed to pick up the medical crew at Kingman. When Mr. Grajeda contacted TC, he was informed about the unauthorized flight. The company's procedures required a pilot to contact TC prior to departure. Mr. Svendsen was aware of that requirement.

On both occasions when Mr. Svendsen flew the aircraft without permission, Mr. Grajeda discussed the situations with him. He obtained Mr. Svendsen's input and reminded him that approval from maintenance or TC (Guardian Air) was necessary prior to flight. Mr. Grajeda considered these discussions verbal counselings. Mr. Svendsen did not really react to the conversations. Concerning the autopilot flight, Mr. Svendsen did state that it was a test flight. However, Mr. Grajeda asserted the maintenance department (Air Methods) still needed to approve such a flight.

Mr. Svendsen also did not follow the chain of command. Instead of coming to Mr. Grajeda as the base manager, Mr. Svendsen "went around" him and spoke to Mr. Grajeda's supervisors or Mr. Wheeler. Because Mr. Grajeda was younger than the other pilots, he believed they resented him and were offended by his position. That belief was reinforced when he learned from Mr. Titus that Mr. Svendsen referred to him as a "punk."

Around November 8, 2001, Mr. Titus called Mr. Grajeda with a complaint Mr. Titus had made to his Guardian Air supervisor about Mr. Svendsen. Mr. Titus' call was for informational purposes. He wanted Mr. Grajeda to know what he had reported. The complaint centered around uniform and degrading language issues. Mr. Titus indicated that he would follow-up with a letter. After the phone call, Mr. Grajeda talked to Mr. McJohnston and told him that a letter was coming to Air Methods concerning those issues. Several days later Mr. Grajeda received a letter (RX 8) from

Mr. Titus. Mr. Grajeda believed Mr. McJohnston had already received a copy of the letter. Mr. Grajeda did not think Mr. Svendsen's derogatory language was appropriate behavior for an Air Methods' pilot. His comments created a hostile work environment.

Mr. Grajeda has a college degree in business administration and aviation management. He has been employed as an aviator since 1997. He felt more than qualified to be a base manager.

Mr. Grajeda had similar issues with Mr. Herb Caceris.

Mr. Grajeda was not on duty on November 3, 2001. He learned about Mr. Svendsen's report from another pilot who indicated the airport manager had concerns about what happened that weekend. So, Mr. Grajeda talked to the airport manager, Mr. Bailes Kelly. Mr. Kelly expressed his concern about how Mr. Svendsen was dealing with Mr. Kelly's employees, calling the police and the mayor. Mr. Kelly observed that while dust was kicked up by the race, an air show was also going on and other aircraft were flying during this period. Mr. Kelly indicated that a NOTAM was up for the possibility of poor visibility. Mr. Grajeda then spoke to Mr. Svendsen and passed on the airport manager's concerns. Mr. Grajeda indicated that it was not Mr. Svendsen's place to display authority over someone who is almost like a customer to Air Methods and also provides services to Air Methods. Mr. Svendsen didn't react in any particular manner. Air Methods does not tell its pilots not to contact persons about safety concerns.

The corporate office contacted Mr. Grajeda to provide him with information about Mr. Svendsen's trip to Denver to meet "with an administrator." He told Mr. Svendsen that the company was asking him to come to Denver. Mr. Grajeda then gave Mr. Svendsen the flight and ticket information.

[Cross examination] Mr. Grajeda never sent any written reports to Denver about the Mr. Svendsen's failure to wear a uniform. Because they worked opposite shifts, Mr. Grajeda did not know whether a stray cat had been at the base operations house.

[Re-direct examination (second day of the hearing)] The Friday before November 12, 2001, Mr. McJohnston told Mr. Grajeda about Mr. Svendsen coming to Denver. At that time, Mr. Grajeda was told that Mr. Svendsen was being brought to Denver to discuss his performance and other issues. Mr. Grajeda then told Mr. Svendsen that he was being brought to Denver for a board review about his performance and other "things that the customer" had brought up in the previous months. Mr. Svendsen replied, "Okay."

[Cross examination (second day of the hearing)] Following his testimony on the first day of the hearing, Mr. Grajeda talked to the Air Methods' attorney about his testimony. All the information about the Denver meeting and transportation that Mr. Grajeda passed on to Mr. Svendsen was verbal. Mr. Grajeda did not tell Mr. Svendsen about any specific situation because he assumed Mr. Svendsen already knew what he had done. Mr. Grajeda believes that information was sufficient for Mr. Svendsen to prepare for the meeting.

Mr. Grajeda did have a conversation with Mr. Svendsen about leaving the two nurses in Kingman. He can't recall Mr. Svendsen's response. Sometimes, Mr. Svendsen would just stay quiet in response. At other times, he nodded or just stared.

When Mr. Grajeda talked to Mr. Svendsen about the November 3, 2001 complaint, he told Mr. Svendsen that Mr. Kelly felt he was "approaching his employees without. . . and you were not their supervisor."

[Re-direct examination (second day of the hearing)] Mr. Svendsen had a few days to prepare for the Denver meeting.

When Mr. Svendsen left the nurses in Kingman, Mr. Grajeda had to go pick them up.

[Cross examination (second day of the hearing)] On the day the nurses were left in Kingman, Mr. Grajeda was the day pilot. After he picked up the medical crew in Kingman, Mr. Grajeda proceeded to Flagstaff for repair of the aircraft. Mr. Svendsen had problem with cabin pressurization. After talking with a mechanic, Mr. Grajeda flew the aircraft to Kingman and then Flagstaff unpressurized. At Flagstaff, the mechanics couldn't find the reported pressurization problem. Based on the information Mr. Svendsen provided, Mr. Herb Caceris first found the problem but didn't document it. Instead, he handed the aircraft to Mr. Svendsen. RX 11 reflects his understanding of the sequence of events concerning the aircraft pressurization problem. Afterwards, Mr. Grajeda did tell Mr. Caceris that he needed to document in the aircraft log any problems he experiences.

[Re-direct examination (second day of the hearing)] RX 11 also reports that Mr. Svendsen failed to contact TC (transport coordinator) prior to departing Kingman. He had a requirement to contact TC and inform them of his departure. Mr. Svendsen could have taken the aircraft to Flagstaff for repairs. Instead, he flew back to Parker, Arizona. When he flew back to Parker, it was close to the end of his regular shift, 9:00 a.m. He could've worked until 11:00 a.m.

[Cross examination (second day of the hearing)] Pilots are usually scheduled for 12 hour shifts. There are times when pilots have to work beyond the 12 hours.

Mr. Richard Titus (TR, pages 280 to 313)

[Direct examination] Mr. Titus is a flight paramedic with Guardian Air. He has been working with air ambulances since 1997. He has been stationed in Parker, Arizona since February 2001. In the month of July 2001, the FAA grounded all the fixed wing aircraft for inspections. At the base operations, a paramedic, flight nurse, and a pilot are usually on duty. The fixed wing flights can carry two patients or a patient and a family member. The medical crew is housed in the same facility as the pilot. The medical personnel work a 48 hour shift straight through. The pilots worked 12 hour shifts, five days in a row. Mr. Titus knows all employees are required to wear a uniform; Guardian Air provided the uniforms. He observed Air Methods' pilots wearing uniforms. It consisted of either a flight suit or a white shirt and blue pants.

Mr. Titus first worked with Mr. Svendsen in August 2001. Mr. Svendsen never wore a uniform. He knows Mr. Svendsen was aware of the requirement because he heard Herb (Mr. Caceris) and Mr. Svendsen talk about it. Herb had his two shirts but not the pants which had to be tailored. Mr. Svendsen replied that he hadn't even ordered his yet because he couldn't read the order forms.

Mr. Svendsen repeatedly referred to Mario as a "young punk." Mr. Svendsen stated he wasn't going to do what the young punk told him to do. Mr. Svendsen downgraded his supervisor and Guardian Air. In particular, Herb and Mr. Svendsen talked about contacting the FAA about having to work 14 hour days instead of 12 hours. They intended to stop that practice. Mr. Svendsen also expressed his adverse opinion about the reimbursement process because he wasn't getting his money back. Also, during one of their first times working together, Mr. Titus awoke and heard Mr. Svendsen in a long conversation arguing with TC about the weather.

The pilots were scheduled from 9:00 a.m to 9:00 p.m. On one occasion, upon a return flight to Parker, their aircraft was diverted to Kingman to pick up a patient near 9:00 p.m. Mr. Svendsen had a temper tantrum and "was kicking" because of the diversion. That was a big issue for Mr. Svendsen. Although the FAA permits flying 14 hours, if a pilot has had 10 hours off, he did not want to work past 9:00 p.m.

On another occasion, at the Parker base, they received a flight request for White River. They responded to the airport and were getting buckled in with the engines running. After they taxied out and took off, Mr. Svendsen threw the aviation map at them to find where White River was located. The flight nurse was familiar with the location, folded the map to its location and handed it to Mr. Svendsen. That was a typical display of Mr. Svendsen's behavior.

Otherwise, Mr. Svendsen kept to himself and didn't talk much. He did not appear to enjoy working for Air Methods. He did not like how it was managed. To the contrary, Mr. Titus believed Air Methods was running a safe operation. Mr. Svendsen also did not seem to like the missions.

On November 8, 2001, Mr. Titus contacted Ms. Jeanine Hanson of Guardian Air about Mr. Svendsen. Mr. Titus was on a rotation schedule with the various bases. On November 8, 2001, he rotated to Flagstaff. Because the issues with Mr. Svendsen had been continuing, Mr. Titus took the opportunity of being assigned in Flagstaff to speak with Ms. Hanson there. He told Ms. Hanson about all the previously discussed problems which are also mentioned in his letter to Mr. Grajeda (RX 8). The mentioned degrading comments refer to Mr. Svendsen's complaints about the company's operations and working beyond 12 hours.

Mr. Titus believes he spoke to Mr. Grajeda about his complaint around November 10, 2001. He mentioned that Mr. Grajeda might hear something about his two pilots because he complained to Ms. Hanson about them. He promised to follow-up with a letter.

Mr. Titus considered Mr. Svendsen's behavior unprofessional because they worked long

hours, sometimes under stress, and were suppose to perform as a team. The medical crew needs to rely on the pilot while they attend to critically ill patients. Mr. Svendsen made that job more difficult.

Mr. Titus did not have any personal knowledge about Mr. Svendsen and stray cats. However, the Parker base operations house still “smells like cat pee.” Based on second-hand reports, Mr. Titus did have a health concern about animals in the facility.

[Cross examination] Mr. Titus didn’t believe he had a duty to confront Mr. Svendsen about the absence of a uniform. Mr. Titus didn’t see Mr. Svendsen or Herb make any calls to the FAA; but, they did talk about doing so constantly.

Based on the appearance of Mr. Svendsen’s clothes and the speed at which he came out of his room when responding to a phone call, Mr. Titus believed he had slept in his clothes. Mr. Titus was not aware that Mayo Aviation had a policy that its pilot wear their uniforms while on duty to cut down response times. Mr Titus doesn’t recall seeing other pilots who appeared to be sleeping in their uniforms. The requisite response time is 20 minutes from notification to take off.

Ms. Hanson is the Guardian Air Program Director. She advised him that the pilots can work up to 14 hours if they have rested 10 hours. The pilot makes the decision on whether a flight is going to take off. Mr. Titus does know that pilots can’t exceed 14 hours of duty. According to Mr. Titus, if there is a problem with that limit, the pilot can contact TC for other options.

[Re-direct examination] Mr. Svendsen typically wore a yellowed, or soiled, shirt. His appearance was unprofessional.

[ALJ examination] Mr. Titus had concerns about both Mr. Svendsen and Herb. Neither pilot flies for Air Methods now. Mr. Titus spoke with about three other medical crew members and they shared his concerns about Mr. Svendsen. For example, one respiratory therapist described how Mr. Svendsen left the medical crew at a location without notifying anyone. Mr. Titus has worked with about 24 Air Methods pilots.

Mr. Bailes Kelly (TR, pages 313 to 353)

[Direct examination] A licensed pilot and former Marine aviator, Mr. Bailes Kelley is currently employed by the Colorado River Indian Tribes as the Airport Manager at Parker, Arizona. He has held that position about five years. In that capacity, he is required to be aware of everything that is occurring at the airport. Three carriers, Sun Care, Native American, and Air Methods, operate out of the Parker Airport. Parker Airport is a private field, owned and operated by the Indian tribe. At the airport, the large aircraft hanger is located on the west side of the runway, offset by about 600 feet. His office is located nearby.

Between July and November 2001, Mr. Kelly had several contacts with Mr. Svendsen.

Although he seemed a reasonable person, Mr. Svendsen was “very overbearing” with Mr. Kelly’s employees. He would be directive and tell them an airport should not be run that way. Due to his status as a commercial pilot, Mr. Kelly’s employees tended to listen to Mr. Svendsen. Mr. Kelly had to explain to them that they worked for him and not Mr. Svendsen. On at least one occasion, Mr. Kelly told Mr. Svendsen that he ran the airport and Mr. Svendsen “was to fly his aircraft.” After that conversation, they did not seem to have any problems.

On November 3, 2001, Mr. Kelly was working at Parker Airport. At that time, an annual car race, called the Whiplash 400, was being run. The race has been conducted for about 10 years. The race circuit is about 93 miles in diameter. The course runs parallel to the entire length of the runway, about 1,500 feet off to the side, and then turns out into the desert. The race consists of four laps. On that Saturday morning, they were running the “big cars.”

Around 10:00 in the morning, Mr. Kelly was contacted by one of his employees who indicated Mr. Svendsen was “raising hell,” wanting the whole race stopped, and demanding that they call the police and the mayor. When Mr. Kelly confronted Mr. Svendsen, Mr. Svendsen stated it was unsafe to fly due to the dust created by the race. Mr. Kelly disagreed but told Mr. Svendsen that he was the pilot and if he felt it was unsafe then he shouldn’t fly. Mr. Svendsen was very upset because the Air Methods’ aircraft was already outside the hanger. They had pulled the airplane out because they were having an event inside the hanger with tables and chairs. Mr. Svendsen was “loud and belligerent.” Mr. Kelly said Mr. Svendsen had no say about the race. Mr. Kelly had notified the FAA on Friday evening, November 2, 2001, about the potential dust and “I gave a note to that effect, that any inbound aircraft, should they check – which they should do on any conditions at any airport they’re inbound to.” He specifically informed Mr. Svendsen that he had posted the NOTAM. That information didn’t seem to make any difference to Mr. Svendsen who replied, “This is the last year they’ll have a race, and I’ll see to that.” Mr. Kelly pointed out that the race had been sanctioned for years. That was the conversation.

Mr. Kelly was upset about the incident and spoke with Mario (Mr. Grajeda) who advised him to call the corporate office. So, Mr. Kelly called the Air Methods’ office in Denver. He told a representative that he was unhappy with Mr. Svendsen because “he was causing disharmony amongst his employees and amongst all the people that were there witnessing the air expo.” Mr. Kelly explained that they had exchanged words and indicated that if Mr. Svendsen “was going to continue to operate in that manner at the airport,” Mr. Kelly would like him transferred to a different airport.

Mr. Kelly’s principal concern was how Mr. Svendsen attempted to take over everything. Mr. Kelly’s call to Air Methods had nothing to do about Mr. Svendsen’s safety concerns.

Mr. Kelly “posted” the NOTAM about the race by calling the Prescott Flight Service Station on Friday evening before the race. Mr. Kelly has seen the December 2001 letter from Mr. Lister of the Prescott Flight Service Station indicating they had no involvement with the airfield or the road race (RX 16). Mr. Kelly doesn’t know what the personnel at Prescott FSS did with the race

information he provided. According to Mr. Kelly, "I called it in and gave it to them, which is standard procedure for the race or any time we have anything that goes wrong with the airport or that might effect air operations. What they do with it, I have no idea." Mr. Kelly does not know whether the FAA actually published a NOTAM about the race. However, the information was also given to every pilot coming in who called into operations by radio that day. Additionally, upon departure, the radio operator would provide local winds, barometric setting and the NOTAM information. It is standard procedure for pilots to contact the airport operations radio. If the FAA did not publish the NOTAM, then a pilot would learn about the field conditions when he called the Parker Airport operations radio.

On the race day, in the early morning, around 7:00 a.m., hanging dust reduced visibility at the airport to about a mile. However, for the rest of the day, the airport did not have a lot of dust due to favorable winds. Around 9:00 a.m. the visibility was "beautiful" and the Pea Mountain was visible on the far side of the race track. The pit stops for the race are located directly across the airfield.

Mr. Kelly agreed the race causes dust but it wasn't hampering flight. They were operating WW II aircraft that day.

Mr. Kelly is normally off on weekends. However, due to the special events going on November 3, 2001, he was at the airport.

[Cross examination] Guardian Air was the only air ambulance service stationed at the Parker Airport in November 2001. Parker Airport is not an official weather reporting station. As a result, the radio broadcast altimeter setting is unofficial.

As an example of Mr. Svendsen's "taking over," Mr. Kelly recalled that although aircraft are to refueled in order, Mr. Svendsen would demand that his aircraft be refueled right away. If he had an emergency flight, they would do so; but otherwise, the aircraft were to be refueled in order.

Mr. Kelly has no idea why one of his employees would tell Mr. Svendsen that he was not on duty on the race day.

Mr. Kelly has called in "a couple hundred" NOTAMS to the FAA. For example, if an aircraft has a flat tire on the runway. He doesn't check to see if they are actually published.

A radio is not required to fly into the Parker Airport because it's an uncontrolled airfield. Mr. Kelly did not consider the road race to be a flight safety hazard. He called in the NOTAM for informational purposes concerning the potential for dust in the area.

[Re-direct examination] Another type of report is a PIREP which is called in by a pilot in-flight. Lake Havasu Airport is about 18 miles away from the Parker Airport. If conditions were bad at the Parker Airport, a pilot could divert to Havasu.

[Re-cross examination] A PIREP is given in flight. About 44 planes are based at the Parker Airport. Some of the pilots flying into the field can only fly VFR.

Ms. Kathleen Bailey, (TR, pages 353 to 404)

[Direct examination] Ms. Bailey is the Human Resource Director for Air Methods. In that capacity, she oversees employment issues, hiring, benefits, “everything.” She has worked for Air Methods for eleven years. She has a degree in human resource management and a human resource professional designation.

Ms. Bailey is familiar with both Mr. Svendsen and the Air Methods’ contract with Flagstaff Medical Center. Under the contract, the pilots stationed in Parker, Arizona, including Mr. Svendsen, were required to wear uniforms.

After Mr. Svendsen was hired in July 2001, Ms. Bailey became aware of performance issue in October 2001 when Mr. Grajeda talked to her in Denver during a training course. Mr. Grajeda requested some ideas on how to deal with Mr. Svendsen and a complaint about the stray cat. She affirmed that no animals should be in the facility because it was a place of business and Mr. Svendsen needed to know that. Due to the contract arrangement, Air Methods’ pilots are usually guests in such facilities and are expected “to be on their best behavior.”

In the typical process for hiring a pilot, after screening for minimum qualifications, Air Methods conducts a series of interviews. A significant portion of the process deals with interpersonal skills to ensure their pilots are good company representatives. Ms. Marley, an human resources specialist, interviewed Mr. Svendsen and expressed some reservations due to his appearance. However, Air Methods gave him the benefit of the doubt. After selection, a pilot goes through a briefing checklist to ensure he understands all the requirements. One of the items on the checklist is the uniform requirement. As a result, Mr. Svendsen was advised of the uniform requirement.

Ms. Bailey met Mr. Svendsen at a pilot orientation for the company. During that meeting, he seemed distracted and needed things repeated.

Although Mr. Svendsen had represented that he had resigned from Mayo Aviation, Ms. Bailey subsequently learned that he had been given that option in lieu of being discharged. On his work history summary, Mr. Svendsen had indicated he left Mayo Aviation because the company lost its contract. While the company did lose its contract, Mr. Svendsen was no longer with them when that occurred.

Concerning expense reports, Air Methods requires the completion of a form that itemizes the expenses. The form must be completed and presented to the supervisor, accompanied by receipts. The supervisor then signs the form and sends it to the operations manager. This procedure was explained to Mr. Svendsen during his orientation.

On November 9, 2001, Mr. Andy McJohnston told Ms. Bailey that he was bringing Mr.

Svendsen in for a disciplinary meeting. The purpose of the meeting was to discuss disciplinary and issues and overall performance. The meeting would also give Mr. Svendsen an opportunity to explain. The purpose of the meeting was not to terminate Mr. Svendsen but to gather information.

On November 12, 2001, five company persons attended the meeting: Ms Marley, Mr. Wheeler, Mr. Freeman, Mr. McJohnston and Ms. Bailey. After a discussion with Mr. Svendsen, he was asked to leave the room. Then the group discussed the case and agreed to terminate Mr. Svendsen. The meeting lasted about 30 to 40 minutes.

Several issues were presented at the meeting. The first item was the uniform. After they told him about the contractual requirement, Mr. Svendsen indicated that noone had told him that he had to have a uniform.

Second, they covered Mr. Svendsen's difficulty with getting the aircraft cabin pressure stable and the importance of stable pressure for the patients. Mr. Svendsen didn't respond.

The third item was personal interaction with the customer. This issue was brought to Mr. McJohnston's attention by Ms. Hanson, the program manager for Guardian Air. She passed on to Mr. McJohnston the complaints regarding: Mr. Svendsen's comments about Mr. Grajeda, his comments about potential FAA calls, and his disrespectful behavior in the cockpit. Ms. Bailey first heard about these complaints as they were being presented at the disciplinary meeting. Concerning his comments about Mr. Grajeda, Mr. Svendsen was told that his behavior was insubordinate and disrespectful. Again, Mr. Svendsen did not appear to have any reaction. They also informed Mr. Svendsen that the company expected Mr. Svendsen to work with the base manager. Instead, he had developed a history of by passing Mr. Grajeda. About expense reports, Mr. Svendsen indicated that he did not know to how to do them.

Finally, during a discussion about interpersonal skills, Mr. Svendsen's behavior toward airport employees on November 3, 2003, and the disruption he caused, were addressed. On that day, he was either ordering the airport employees to call the police or he was placing the calls. Noone at the meeting stated Mr. Svendsen was being fired because of his November 3, 2001 report to the airport manager. Nothing was mentioned about dust condition at the airport. Air Methods instructs its employees to be conservative about safety issues.

In summary, Mr. Svendsen was dismissed by Air Methods for performance issues relating to non-compliance with company policy, his insubordination to Mr. Grajeda, and lack of interpersonal skills. His employment contract was "at will." That relationship was explained to Mr. Svendsen and documented in his employment contracts (RX 6 and RX 7)

[Cross examination] Knowledge that Air Methods would be taking over the contract from Mayo Aviation was public probably 60 to 90 days prior to the effective date. Mayo Aviation was located at the same airport in Denver as Air Methods.

Any person, including the paramedics may cancel a flight. Air Methods informed its employees and the Guardian Air employees that if any one of them was uncomfortable at any time with a flight, they could cancel it.

At Mr. Svendsen's pilot orientation, the company covered all its usual orientation material.

Mario (Mr. Grajeda) told Ms. Bailey about the stray cat problem during the base manager training that occurred about October 23, 2001. She did not recall who had made the complaint or when the incident happened. Ms. Bailey never visited the base operations at Parker, Arizona. She did not document the complaint in Mr. Svendsen's personnel file. That was the usual practice when base managers called her for advice.

[ALJ examination] Ms. Bailey is a certified human resources professional. As such, she is aware of multiple approaches to disciplinary actions from verbal to writing to notice. That process provides documentation and gives an employee an opportunity to respond.

Mr. Svendsen was told at the November 12, 2001 meeting the purpose of the hearing. Ms. Bailey believes Mr. Svendsen's interaction with Mario (Mr. Grajeda) gave him notice of his noncompliance and his situation.

The company never has placed a termination in writing.

[Re-direct examination] Air Methods is an "at will" employer, located in Colorado, which is an "at will" employment state. The company does not represent to its employees that it will follow a stepped discipline procedure. An employee can be terminated at any time, both without a stated reason or notice. Mr. Svendsen was advised of this employment relationship when he started working for Air Methods.

Based on the issues discussed at the November 12, 2001 meeting, Air Methods would have taken the same action, despite Mr. Svendsen's November 3rd visibility complaint. He was not counseled for contacting the various authorities. The focus was on how he interacted with the airport personnel. After being informed that the race had been approved, he made repeated, unreasonable demands that someone investigate the race and stop it.

[ALJ examination] Ms. Bailey has been the Air Methods' Human Resource Manager since February 2001. She has been involved in about a dozen disciplinary hearings; 90% involved pilots. Three-fourths of those proceedings resulted in termination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Probative Weight Findings

While most of the witnesses seemed credible witnesses and provided probative testimony,

several direct conflicts in testimony and other inconsistencies require that I periodically make credibility and probative value determinations. Within brackets ([-]) in the following specific findings, I will discuss in more detail my assessment of such testimonial conflicts.

Specific Findings

Based on the documents in the record and the probative sworn testimony, I make the following findings of fact.

Spring 2001 - [[With some reluctance, I need to start my findings with a cat. According to Mr. Grajeda, he received complaints from other crew members about Mr. Svendsen feeding a stray cat in the base operations facility. Eventually, he asked Mr. Svendsen to stop the practice. Ms. Bailey confirmed discussing the situation with Mr. Grajeda in October 2001. Additionally, although Mr. Titus had not seen the cat, he commented that the facility still smelled like cat urine. Notably absent in any of these presentations is any specificity about when and how the cat feedings occurred. On the other hand, Mr. Svendsen did provide an explanation and specific time frame for the cat incident. In the absence of any direct evidence to the contrary, I accept his version of the cat feeding.]]

While working as a pilot for Mayo Aviation, and residing at the Parker, Arizona base operations facility, Mr. Svendsen provides milk to a cat outside. When a medical crew member objects, Mr. Svendsen stops feeding the cat. (Mr. Svendsen's testimony)

June 18, 2001 - Mr. Svendsen, who had been flying as a pilot for Mayo Aviation at Parker, Arizona, applies for a pilot position with Air Methods which is scheduled to take over the Mayo Aviation contract in August 2001. (Mr. Svendsen's testimony)

Approximately June 2001 - Air Methods and Flagstaff Medical Center enter into a contract, effective August 1, 2001, that requires Air Methods' pilots to follow its personnel policies which include a uniform requirement. The costs of the uniforms will be split between Air Methods and Flagstaff Medical Center. Although the contract also establishes a three manager board to consider removal of personnel, Air Methods reserves the right to unilaterally remove its personnel. Under the contract, Air Methods provides flight operation services which include an FAR Part 135 operations certificate and pilots. The aircraft are owned by Guardian Air which provides the requisite flight authority (Testimony of Mr. Svendsen, Mr. Wheeler, and JX 1)

FAR Part 135.67 requires that a pilot who encounters an hazardous meteorological condition which he believes may be essential to the safety of other flights to notify the appropriate ground station as soon as possible. FAR Part 135.65 (b) requires a pilot to record in an aircraft maintenance log any mechanical irregularity that comes to his attention. (CX 5 and CX 6)

June 20, 2001 - Mr. Svendsen accepts and signs a conditional offer of employment with Air Methods contingent upon his successful completion of training. The contract indicates that Air

Methods is an “at will” employer. (Mr. Svendsen’s testimony and RX 6).

Between June 20, 2001 and July 27, 2001 - Mr. Svendsen attends training and pilot orientation with Air Methods. On June 29, 2001, Mr. Svendsen signs a form acknowledging his receipt of Air Methods’ policies, his responsibility to comply, and his understanding that non-compliance may result in termination. (Testimony of Mr. Svendsen, Mr. Wheeler, and RX 12)

July 27, 2001 - Mr. Svendsen signs an employment contract with Air Method as a pilot of a King Air aircraft used as an air ambulance. The contract indicates the employment relationship is “at will” which may be terminated by either party. Mr. Svendsen understands the employment is “at will” but anticipates a long term employment based on representations from the chief pilot, Mr Wheeler. (Mr. Svendsen’s testimony and RX 7)

Sometime after August 1, 2001 - After the Air Methods’ contract started, Mr. Grajeda gives Mr. Svendsen paperwork for uniform measurements. (Testimony of Mr. Svendsen and Mr. Grajeda)

A private, uncontrolled airfield, the Parker Airport is located on the reservation owned, and controlled, by an Indian tribe. The airfield has a 4,800 foot runway and a VOR approach capability. Although the airport has a local radio contact, it is not an official weather reporting site and does not have a control tower. The approach weather minimums at Parker Airport for pilots flying under FAR Part 135 is three miles visibility. The departure minimum is one-half mile for an instrument takeoff. (Testimony of Mr. Svendsen and Mr. Kelly, CX 7, CX 8, and CX 9)

August 9, 2001 - Due to Mr. Svendsen’s gruff confrontation with a crew member during a training flight, in which he raised his voice more than necessary to overcome the cockpit noise, Mr. Wheeler counsels him to be more careful and guard against such an approach. (Mr. Wheeler’s testimony)

Mid-August 2001 - Mr. Svendsen receives a call about uniform measurements from a Guardian Air representative. Mr. Svendsen gives the individual his measurements. Eventually, he receives a form for ordering uniforms but it was unreadable. Mr. Svendsen takes no other action to obtain a uniform and waits for the company to provide it. (Testimony of Mr. Svendsen and Mr. Titus)

After August 2001 - Mr. Svendsen works a 12 hour shift, five days on, at the Parker Airport. During this time, he remains on alert for flight notification from the Guardian Air dispatcher either at the Parker Airport or at the base operations facility, a three bedroom house located near the airfield. He shares the facility with two members of the medical flight crew who work a 24 hour shift, two days on. When notified that a patient needs air ambulance transportation, Mr. Svendsen and the medical crew fly to the patient’s location, pick up the patient, and then fly the individual to another medical facility, usually in Phoenix, Arizona. (Testimony of Mr. Svendsen and Mr. Titus)

Fall 2001 - Mr. Svendsen experiences difficulties with the aircraft tow tug stalling. He

attempts to contact Mr. Grajeda but is unsuccessful. Mr. Svendsen speaks with Guardian Air TC and is told to fix the tug. He calls a repairman and later submits an expense reimbursement report. On another occasion, Mr. Svendsen forgets to get Mr. Grajeda's signature approval prior to purchasing gas for the tug. When he discovered low fuel in the tug, Mr. Svendsen contacted TC and was told to buy more gas. He did so.
(Mr. Svendsen's testimony)

[[While Mr. Svendsen acknowledges that he did receive some paperwork for a uniform, he represents that no one ever talked to him about the uniform requirement. Mr. Grajeda has presented evidence to the contrary. According to Mr. Grajeda, after he learned Mr. Svendsen had not yet started wearing a uniform, he left another set of the measurement paperwork in Mr. Svendsen's office mailbox. Eventually, Mr. Grajeda talked to Mr. Svendsen about wearing a uniform.

I resolve this factual dispute in Mr. Grajeda's favor due to Mr. Svendsen's approach to this issue. At first, Mr. Svendsen demonstrated reluctance to even acknowledge any awareness of a uniform requirement. Eventually, he did agree that he knew of the uniform requirement when he started working for Air Methods but then in the absence of other pilots wearing uniforms, he assumed it no longer applied. Additionally, because he received illegible paperwork for his uniform, he couldn't complete it and did nothing further. Notably absent in Mr. Svendsen's explanation is any indication he attempted to clarify with any Air Methods' supervisor whether the uniform requirement still existed. Likewise, his response of doing nothing about the unreadable uniform paperwork reflects disdain for, rather than a misunderstanding about, the uniform requirement.

In comparison, I found Mr. Grajeda's demeanor and testimony more credible on this issue. His presentation was consistent with the company's policy on uniforms and the testimony of other Air Methods' supervisors, including Mr. Wheeler, the chief pilot.]]

When Mr. Svendsen continues to not wear a uniform, Mr. Grajeda provides additional paperwork on uniform measurements and eventually discusses the uniform requirement with Mr. Svendsen. (Mr. Grajeda's testimony)

[[During the time he flew with Mr. Svendsen, Mr. Titus claims Mr. Svendsen made derogatory remarks about the company's operations, Mr. Grajeda, referring to him as a "punk," and other crew members. Mr. Titus also heard Mr. Svendsen complain about the company's reimbursement process and not getting his expenses paid. Mr. Titus reports Mr. Svendsen occasionally lost his temper in front of other crew members. He believed Mr. Svendsen's negative and unprofessional attitude adversely affected their work. Finally, Mr. Titus was frustrated by Mr. Svendsen's failure to wear a uniform.

Mr. Svendsen maintains that he never called Mr. Grajeda a "punk" and he provided an explanation about the absence of a uniform. At the same time, Mr. Svendsen did not directly refute other aspects of Mr. Titus's complaint.

In terms of demeanor, Mr. Titus was a credible witness. Additionally, the record does not contain any information why he might fabricate the items in his complaint to Ms. Hanson and Mr. Grajeda, as well as his affidavit and testimony. As presented later in this opinion, I have some reservations about the accuracy of Mr. Svendsen's recollection about specific events. In this case, that doubt, coupled with Mr. Titus' demeanor and apparent lack of motive for fabrication, leads me to conclude that Mr. Titus' version of Mr. Svendsen's behavior and statements about Mr. Grajeda has greater probative weight.]]

During this time frame, Mr. Svendsen makes periodic derogatory remarks about Air Methods' operations and reimbursement practices, other crew members, and Mr. Grajeda, referring to him as a "punk." Mr. Svendsen also does not wear a uniform and occasionally loses his temper in front of other crew members. (Mr. Titus' testimony and RX8)

Sometime after September 15, 2001 - Mr. Grajeda writes to Mr. Jeff Freeman indicating that Mr. Svendsen did not follow proper procedures when he flew an aircraft from Kingman, Arizona to Parker, Arizona. Even though the medical crew asked him to stay in Kingman, Mr. Svendsen departed, leaving the medical crew behind. He also failed to contact TC prior to his departure.⁸ (Mr. Grajeda's testimony and RX 11)

Sometime in the fall of 2001 before November 3, 2001 - Mr. Svendsen sends his accumulated receipts for about \$170 to \$175 in expenses and an expense report to Mr. McJohnston. Mr. McJohnston returns the paperwork because it does not have Mr. Grajeda's approval signature. Mr. Grajeda writes two notes to Mr. Svendsen about various reimbursement items, including gas purchase and a repair bill for the aircraft tug. Mr. Grajeda reminds Mr. Svendsen that he must obtain his signature approval prior to sending in the expense report for reimbursement. (Testimony of Mr. Svendsen, Mr. Grajeda, and RX 9)

Friday, November 2, 2001 - [[As addressed below, while I ultimately determine that a NOTAM for November 3, 2001 was not published by the Prescott FSS, I also found Mr. Kelly sufficiently credible to conclude that he did contact the Prescott FSS in an effort to get the NOTAM published.]]

As the Parker Airport Manager employed by the Colorado River Indian Tribes, Mr. Kelly contacts the Prescott FSS and asks them to publish a NOTAM about the potential for reduced visibility at the Parker airfield the next day due to a road race. A copy of the NOTAM is also posted at the airport office. (Mr. Kelly's testimony)

On or before November 3, 2001 - Mr. Svendsen writes, and by certified mail, a letter to the chief pilot of Air Methods, Mr. Wheeler, about this rejected expense report. He explains the reasons

⁸Mr. Svendsen testified that the medical crew did not ask him to stay and that TC instructed him to return to Parker. Resolving this factual dispute is not essential to the adjudication of Mr. Svendsen's case. Instead, my finding above merely documents that Mr. Grajeda sent such a letter to his Air Methods' supervisor, Mr. Freeman.

why reimbursement for various items is appropriate and adds that in the future he would no longer carry expenses for Air Methods. Mr. Svendsen also attached two notes that he received from Mr. Grajeda. One of the notes informs Mr. Svendsen that no one had approved the expenditure of \$53 for the installation of a spark plug on the aircraft tug, adding Mr. Svendsen could have installed the spark plug himself. Mr. Svendsen responds in capital letters that he is not a mechanic and it is not his job to replace spark plugs. (RX 9, RX 10, RX 12, and RX 20).

Saturday, November 3, 2001 - The Colorado River Indian Tribes host a 400 mile off-road race called the Whiplash 400, which covers a 90 to 93 mile circuit. Both the local tribe and the Bureau of Land Management authorized the race. In the morning, the "big" cars are racing. On the same day, several aircraft operate out of Parker Airport without any problems. Three WW II aircraft are also exhibited. (Affidavit (RX 4) and Testimony of Mr. Bailes Kelly)

[[The first among several necessary factual determinations concerning this day involves the presence of a dust obstruction at the Parker Airport.

According to Mr. Svendsen, after receiving a dispatcher call for a flight and finishing his pre-flight preparations, he proceeded to the airport around 11:00 a.m and observed that visibility was reduced to between one and two miles due to dust. The winds were calm. Upon take-off and during his climb-out, Mr. Svendsen observed cars racing on a track east of, and parallel to, the runway. When Mr. Svendsen returned to the Parker Airport a couple hours later after flying to Phoenix, Arizona to deliver a patient, the visibility had dramatically improved and he was able to accomplish a VFR approach and landing.

Mr. Kelly also observed a dust obstruction at the airfield on that day caused by the race cars. While at the airport around 7:00 a.m., Mr. Kelly noted the visibility had decreased to about one mile due to the nearby road race. The winds were calm at that time. However, by 9:00 a.m the visibility was clear. The winds became favorable and visibility at the field greatly improved.

As to be discussed in further details, I have diminished confidence in the accuracy of some of Mr. Svendsen's testimony. However, on this issue, his description of a dust obstruction at the airfield is partially corroborated by Mr. Kelly's credible testimony and supported by Colorado River Indian Tribes' Police Department log for November 3, 2001 which annotates Mr. Svendsen's call at 9:19 a.m. about a visibility problem associated with dust.

Although based on their testimony Mr. Svendsen and Mr. Kelly appear to disagree on the specific timing of the dust cloud - 11:00 a.m. versus 7:00 a.m - that testimonial dispute is not particularly important for two reasons. First, based on the police log entry showing Mr. Svendsen's call came in at 9:19 a.m. and not 11:00 a.m., the separation between their observations is a little over two hours rather than four hours. Second, and significantly, the consistent portions of their recollections establish that in the morning of November 3, 2001, during a period of calm winds, dust from the road race reduced visibility down to a mile to two miles at the Parker Airport.]]

In the morning of November 3, 2001, during a period of calm winds, a dust cloud caused by a nearby off-road race reduces the visibility at the Parker Airport to about one mile. Later in the day, due to favorable winds, the dust has been blow away and visibility improves significantly at the airfield even though the race continues throughout the day. (Testimony of Mr. Svendsen and Mr. Kelly, and RX 15)

[[The second factual issue involves the existence of a published NOTAM concerning the potential for reduced visibility at the Parker Airfield due to the road race. As discussed later, whether a NOTAM existed is relevant in part to the reasonableness of Mr. Svendsen's safety complaint. Mr. Kelly was adamant that he had put out a NOTAM about the nearby road race and the potential for diminished visibility at the airfield. Accordingly, based on his credible testimony, I have already determined that Mr. Kelly did issue a NOTAM about visibility to the Prescott Flight Service Station the day before the race. At the same time, Mr. Svendsen is equally confident that during his pre-flight preparations on November 3, 2001, he checked the NOTAMs and did not find one published for the Parker Airport.

Based on these presentations, Mr. Kelly and Mr. Svendsen seem to be in direct conflict over whether a NOTAM about reduced visibility for November 3, 2001 existed. However, upon closer consideration of their testimony, I conclude that no real dispute exists on this issue because both Mr. Kelly and Mr. Svendsen are correct.

Specifically, Mr. Kelly's credible testimony only establishes that he presented the NOTAM to the Prescott FSS on Friday, November 2, 2001. Since he didn't follow-up and check the official NOTAMS on Saturday, November 3, 2001, Mr. Kelly does not know whether the NOTAM was actually published by the Prescott FSS. In other words, Mr. Kelly's testimony falls short of establishing that a published NOTAM about the reduced visibility was available to an aviator reviewing the published NOTAMS on November 3, 2001.

Consequently, one explanation for Mr. Svendsen's failure to find the reduced visibility NOTAM on Saturday, November 3, 2001 is that the Prescott FSS did not publish Mr. Kelly's NOTAM. That explanation becomes much more probable in light Mr. Lister's December 2001 letter indicating the Prescott FSS would not publish the NOTAM for Parker Airport because it was not in charge of the road race. While Mr. Lister's letter does not definitively resolve the issue, his failure to confirm that the Prescott FSS published the reduced visibility NOTAM adds considerable support for Mr. Svendsen's representation that he found no such NOTAM on Saturday, November 3, 2001, when he checked the published NOTAMS.]]

On November 3, 2001, during his pre-flight preparations, Mr. Svendsen checked the published NOTAMS and did not find a NOTAM alerting aviators of the potential dust obstruction hazard at the Parker Airport for that day.

In the absence of a published NOTAM on reduced visibility and based his morning observation of dust obstruction at the airfield, Mr. Svendsen becomes concerned that other pilots

might fly into Parker Airport unaware of the potential hazard of reduced visibility. Due to his concern, Mr. Svendsen contacts the Prescott FSS and requests that a visibility NOTAM be published for the Parker Airport. The Prescott FSS advises that it can not issues such a NOTAM and recommends he contact local authorities. Based on this advice, Mr. Svendsen also calls the Colorado River Indian Tribes Police Department at 9:19 a.m, reports that the race is causing a bad dust problem, and relays his concern about reduced visibility. (Mr. Svendsen's testimony, RX 15, and RX 16)

[[The starkest factual dispute for this day, and in the case, concerns whether Mr. Svendsen had a confrontation with Mr. Kelly at Parker Airport on November 3, 2001. Asserting he was told Mr. Kelly was unavailable until the following Tuesday, Mr. Svendsen testified that he did not see, or talk to, Mr. Kelly on November 3, 2001. Whereas, Mr. Kelly testified that Mr. Svendsen did approach him on that day and they did have a conversation. Resolution of this factual dispute requires assessing both the respective witnesses' accuracy of recollection and demeanor.⁹

In terms of recollection, although he was certain that he did not talk to Mr. Kelly on November 3, 2001, Mr. Svendsen's description of the day's events and their sequence was somewhat confused. After initially testifying assertively about the sequence of his contacts and other actions, Mr. Svendsen then upon further consideration felt compelled to reorder some of the events. Further, as the police log indicates, Mr. Svendsen's testimonial recollection of the timing of his dust observation was inaccurate.

In terms of witness demeanor, over the course of his testimony throughout the hearing, when questioned about potentially significant subjects, Mr. Svendsen would occasionally equivocate and demonstrate less than desirable candor and accuracy in his responses. Although the following examples are not necessarily individually significant, the pattern of these testimonial hesitations takes its toll and adversely affects the characterization of Mr. Svendsen's demeanor.

First, concerning his knowledge of the uniform requirement, Mr. Svendsen's initial responses left the impression that he was not really aware of the requirement. However, upon renewed, and more specific, questioning, Mr. Svendsen eventually acknowledged that he knew about the uniform requirement.

Second, in regards to the timing of his letter to Mr. Wheeler, prolonged and close questioning was necessary to finally obtain Mr. Svendsen's acknowledgment that he mailed the envelope, labeled RX 20, postmarked November 3, 2001.

Third, several times, Mr. Svendsen would give two different answers to the same question.

⁹Consideration of motive does not particularly help resolve the matter. Mr. Svendsen, as the complainant in this case, might benefit from a recollection that contains no inappropriate behavior towards Mr. Kelly. Somewhat in a similar manner, Mr. Kelly, as an employee of the Indian tribe whose race was reported to the police might feel some animosity towards Mr. Svendsen.

On direct examination, Mr. Svendsen indicated he waited an hour before the November 12, 2001 meeting. On cross examination, he stated the wait was two hours. Then, again during direct examination, Mr. Svendsen stated that in the November 12, 2001 meeting, Air Methods' managers mentioned the uniform issue. On cross examination, Mr. Svendsen denied that the managers talked about the uniform issue as a basis for this termination. And, Mr. Svendsen first testified that he did not write a letter to Mr. Freeman as a response to a letter by Mr. Grajeda. Yet, when presented with a copy of the letter, Mr. Svendsen agreed that his correspondence was indeed a response to Mr. Grajeda's letter.

In contrast, both in the manner of presentation and demeanor, Mr. Kelly was the more reliable witness. With steadfast responses, he did not hesitate or falter in his answers about the events of November 3, 2001. He provided vivid details of the events occurring on that day to clearly establish that contrary to Mr. Svendsen's assertion, Mr. Kelly was on the airfield on November 3, 2001. In particular, he observed the dust cloud reported by Mr. Svendsen; participated in setting up the special event in the aircraft hanger; noted that the Air Methods' aircraft had been pulled out of the hanger in order to allow tables and chairs to be set up; assisted with the WWII flying demonstration; and noted the on-going car race.

His hearing testimony was also consistent with the events that he described to Mr. Grajeda just a few days after November 3, 2001. With the events obviously fresh in his mind, Mr. Kelly reported to Mr. Grajeda that while dust was kicked up by the race, a NOTAM had been issued and other aircraft, some from a WW II demonstration, were flying. Mr. Kelly also expressed his concern about Mr. Svendsen's treatment of his employees and his call to the police.

In a similar fashion, demonstrating candor and sincerity in his responses, Mr. Kelly's demeanor on the witness stand was credible. Unlike some of Mr. Svendsen's testimony about the events of November 3, 2001, Mr. Kelly's responses invoked confidence, rather than caution, in the integrity of his recollection.

Consequently, based on Mr. Svendsen's confused presentation of the November 3, 2001 events and somewhat diminished demeanor in light of periodic equivocation, less-than-candid responses, and pattern of varying answers, I have reduced confidence in the accuracy of his recollection on the key issue of any interaction with Mr. Kelly on November 3, 2001. In comparison, based on Mr. Kelly's steadfast and consistent recollection of the incidents that day coupled with his contrasting credible demeanor, I find Mr. Kelly the more probative witness on this portion of the day's events. Accordingly, I conclude that Mr. Kelly was at the Parker Airport on November 3, 2001 and he did have a conversation with Mr. Svendsen on that day.]]

On November 3, 2001, in the morning at the Parker Airport, Mr. Kelly receives a report from one of his employees that Mr. Svendsen is "raising hell" about the road race. Eventually, Mr. Kelly has a conversation with Mr. Svendsen. (Mr. Kelly's testimony)

[[Having determined that Mr. Kelly is more believable than Mr. Svendsen on whether they had a conversation on November 3, 2001, and in light of Mr. Svendsen's denial of such a discussion,

I rely on Mr. Kelly's recollection to determine the contents of that discussion.]]

During his conversation with Mr. Kelly, Mr. Svendsen is very upset, loud and belligerent. Mr. Svendsen states he was not aware of the race and asserts that it is unsafe to fly due to the dust. Mr. Kelly informs Mr. Svendsen that he should have known about the event due to a NOTAM. He tells Mr. Svendsen that local authorities have approved the race. If Mr. Svendsen believes it is unsafe to fly, he should change his flight plan. However, Mr. Svendsen persists and demands that local authorities investigate the race and stop it. He also promises to make sure the race never happens again. Finding Mr. Svendsen belligerent and domineering, Mr. Kelly indicates that he will take his concerns to Air Methods. (Mr. Kelly's affidavit (RX 4) and testimony)

A few days after November 3, 2001 - Mr. Wheeler receives Mr. Svendsen's letter about his rejected expense report. Mr. Wheeler considers the tone of the letter insubordinate. Mr. Wheeler talks to Mr. McJohnston about the letter and his reaction. (Affidavit (RX 1) and testimony of Mr. Wheeler)

Upset about his conversation with Mr. Svendsen, Mr. Kelly talks with Mr. Grajeda about Mr. Svendsen and the events of November 3, 2001. Mr. Grajeda advises him to contact Air Methods in Denver. Mr. Kelly calls the Denver office and again describes the November 3, 2001 incident. In particular, Mr. Kelly reports that Mr. Svendsen caused disharmony among Mr. Kelly's employees and other participants at the air expo. Based on this exchange with Mr. Svendsen, Mr. Kelly tells Air Methods that if Mr. Svendsen continued in that manner, he would like Mr. Svendsen transferred to other airfield. (Testimony of Mr. Grajeda and Mr. Kelly)

Having learned of the airport manager's concerns about Mr. Svendsen's actions on November 3, 2001, Mr. Grajeda speaks with Mr. Svendsen and passes on the manager's observations. Mr. Grajeda tells Mr. Svendsen he should not display authority over individuals who are similar to an Air Methods' customer and also provide services to Air Methods. Mr. Svendsen did not appear to react to the conversation.¹⁰ (Mr. Grajeda's testimony)

November 8, 2001 - Mr. Richard Titus, a Guardian Air certified emergency paramedic, makes a formal complaint to Ms. Jeannie Hanson, a Guardian Air supervisor, about Mr. Svendsen's conduct. Mr. Titus reports that Mr. Svendsen has made derogatory comments about Mr. Titus, Mr. Grajeda, Air Methods, Guardian Air and Ms. Hanson in the presence of employees of both Guardian Air and Air Methods. Mr. Titus expresses his opinion that Mr. Svendsen's actions are disrespectful, insubordinate and disruptive. Additionally Mr. Svendsen is not complying with the uniform requirement. After flying with Mr. Svendsen for several months, Mr. Titus presented his complaint on November 8, 2001 because he had seen enough.

Between November 8 and November 10, 2001 - After speaking with Ms. Hanson, and based on her advice, Mr. Titus contacts Mr. Grajeda and informs him of the formal complaint. The

¹⁰When Mr. Grajeda told Mr. Svendsen about Mr. Kelly's complaint, Mr. Svendsen was silent, neither objecting to, nor correcting, Mr. Kelly's version of the incident.

complaint involves Mr. Svendsen's derogatory language and uniform. Mr. Titus indicates that he will send a letter to commemorate the phone call.¹¹ Mr. Grajeda then calls Mr. McJohnston about the complaint and pending letter. Ms. Hanson of Guardian Air also contacts Mr. McJohnston about Mr. Titus' complaint (Testimony of Mr. Grajeda and Ms. Bailey, and affidavit (RX 6) and testimony of Mr. Titus))

November 9, 2001 - Mr. McJohnston tells Mr. Grajeda that Mr. Svendsen will be coming to Denver to discuss performance and other issues. Mr. Grajeda then informs Mr. Svendsen of the meeting about performance and other issues. Mr. Svendsen replies, "Okay." (Mr. Grajeda's testimony)

Mr. McJohnston also advises Ms. Bailey of a meeting with Mr. Svendsen scheduled for November 12, 2001 to discuss his performance issues. (Ms. Bailey's testimony)

November 12, 2001 - Mr. Svendsen flies to Denver, Colorado and proceeds to the main office of Air Methods. (Mr. Svendsen's testimony)

At the meeting Air Methods' representatives are Ms. Mary Marley, Mr. Andy McJohnston, Ms. Kathy Bailey, Mr. Jeff Freeman, and Mr. Michael Wheeler (Testimony and affidavits (RX 1 and RX 2) of Mr. Wheeler and Ms. Bailey)

[[Based on the conflicting testimony of Mr. Svendsen, Mr. Wheeler and Ms. Bailey, a factual dispute also exists over the manner and contents of the November 12, 2001 meeting in Denver.

Mr. Svendsen recalls waiting an hour or two for a meeting with Mr. McJohnston, the chief pilot, the human resource manager, and others. In the meeting, which lasted only a few minutes, Mr. Svendsen was terminated for two stated reasons. First, the Indian tribe was upset about his call to the local police and indicted they may not permit him back on their airfield. Second, the Air Methods' managers mentioned something about a uniform issue. According to Mr. Svendsen, he was not told his separation was due to his uniform, interpersonal skills, or failure to follow company policies.

Although Mr. Wheeler is uncertain how long Mr. Svendsen may have waited for the meeting, he believes the hearing itself last longer than a minute and a half. Mr. Wheeler recalls the meeting addressed the following issues: Mr. Svendsen's unprofessional letter to Mr. Wheeler, his failure to wear a uniform, his argumentative and confrontational behavior with co-workers and customers, a stray pet in quarters, Mr. Titus' complaint about interpersonal behavior, and the "manner" in which Mr. Svendsen raised his concern about the dust obstruction. Mr. McJohnston told Mr. Svendsen he was being terminated for performance and behavior issues.

¹¹On November 14, 2001, Mr. Titus signed a letter to Mr. Grajeda setting out the various aspects of his complaint about Mr. Svendsen and added that Mr. Svendsen also threatened to make calls to friends in high places in the FAA about the operations. (RX 8 and Mr. Titus' testimony)

According to Ms. Bailey, the entire meeting lasted 30 to 40 minutes. Mr. Svendsen was confronted with several performance issues including his uniform, personal interaction with customers and disrespectful behavior based on Mr. Titus' complaint, and his behavior towards employees at the Parker Airport on November 3, 2001. Consequently, Mr. Svendsen was terminated for performance issues relating to non-compliance with company policies, insubordination towards Mr. Grajeda, and lack of interpersonal skills.

These three participants in the November 12, 2001 meeting agree that both Mr. Svendsen's lack of a uniform and his actions on November 3, 2001 were addressed. However, Mr. Svendsen asserts nothing else was covered; whereas, Mr. Wheeler and Ms. Bailey recall other issues being presented. As previously discussed, on key events, Mr. Svendsen's presentation did not appear consistently reliable. On the other hand, Mr. Wheeler and Ms. Bailey seemed generally credible during their testimony. Due to both the credible demeanor of Mr. Wheeler and Ms. Bailey, and their near consistent recollection of the factors presented to Mr. Svendsen at the November 12, 2001 meeting, I find the testimony of Mr. Wheeler and Ms. Bailey represents the preponderance of the more probative evidence on the contents of the November 12, 2001 meeting.]]

At the November 12, 2001 meeting at Air Methods' office in Denver, Colorado, numerous performance issues are presented to Mr. Svendsen. Some of the company's concerns involve Mr. Svendsen's failure to wear the requisite uniform or follow company procedures; Mr. Svendsen's disrespectful comments about his supervisor, Mr. Grajeda; and, his confrontational and argumentative behavior towards co-workers and customers. Company representatives also confront Mr. Svendsen with his un-professional, confrontational, and over-bearing behavior toward employees at the Parker Airport on November 3, 2001. At the conclusion of the meeting, Mr. McJohnston terminates Mr. Svendsen for failure to comply with company policies and procedures, insubordination, and lack of interpersonal skills. (Affidavits (RX 1 and RX 2) and testimony of Mr. Wheeler and Ms. Bailey)

Case in Chief, Affirmative Defense, and Burdens of Proof

Under the analytical framework set out in 42 U.S.C. § 42121(b) (2) (B) and 29 C.F.R. §§ 1979.104 and 1979.109, the adjudication of an AIR 21 discrimination complaint involves consideration of the complainant's case in chief, the respondent's potential affirmative defense, and the respective burdens of proof.¹²

¹²At one point in the proceeding, Air Methods presented a jurisdictional challenge in that Mr. Svendsen had not established that Air Methods was an air carrier subject to the provisions of AIR 21. I note that the evidence in the case indicates that at the time of the alleged discrimination, Air Methods was providing flight services under an FAR Part 135 certificate to Guardian Air. That contractual relationship and service appears sufficient to subject Air Methods to the AIR 21 employee protection provisions.

Some argument was also presented that since Air Methods was an "at will" employer capable under state law of terminating employment with or without cause, concerns about the manner and reasons for Mr. Svendsen's termination may be irrelevant and not subject to close scrutiny, even under Air 21. Air Methods did not provide
(continued...)

Case in Chief

Regarding a complainant's case in chief, to establish a discrimination complaint and entitlement to relief, the complainant must prove by a preponderance of the evidence that a protected activity was a contributing factor¹³ in an unfavorable personnel action. In the absence of direct evidence of discrimination, such as an admission by a respondent that discrimination was factor, a complainant may establish the inference of discrimination by presenting a *prima facie* case of discrimination¹⁴ involving the following four elements: (1) the complainant engaged in a protected activity; (2) the respondent knew the complainant engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and, (4) the circumstances are sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 1979.104 (b) (1) (i) to (iv); *see also* *Zinn v. University of Missouri*, 93 ERA 34 and 36 (Sec'y Jan 18, 1996).

If the complainant presents evidence of a *prima facie* case, the respondent then has an opportunity to produce evidence either challenging the existence of the *prima facie* elements, thereby negating the inference of discrimination, or demonstrating that discrimination was not involved. Upon the presentation of the respondent's evidence, the complainant's establishment of a *prima facie* case becomes irrelevant. Instead, the trier of fact must determine the ultimate issue in the case in

¹²(...continued)

any legal authority to support the implication that an "at will" employer may not be subject to the employment discrimination provisions of AIR 21. Thus, inquiry into the stated reasons of complainant's termination remains appropriate. However, concerning the manner of termination, the Administrative Review Board ("ARB") recently observed that while the Federal employee protection provisions prohibit discrimination, they do not establish a code of sound personnel management. *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002). Consequently, in that case, the ARB reversed an ALJ's finding that the absence of progressive discipline established that the respondent's stated reasons for discharge were pretextual.

¹³The court in a case involving a protected activity discrimination complaint under the ERA, which contains similar employee protection provisions as AIR 21, *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning an adverse personnel action.

¹⁴I recognize the Administrative Review Board's position that in a fully litigated case in which the respondent presents evidence of a legitimate motive for the personnel action, the analysis of a *prima facie* case serves no analytical purpose because the final decision will rest on the complainant's ultimate burden of proof. *See Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998) and *Carter v. Electrical District No. 2 of Pinal*, 92-TSC-11 (Sec'y Jul. 26, 1995). However, despite some duplication of effort, I find that working through the *prima facie* elements useful because if the complainant, even in a fully litigated hearing, fails to establish an element of the *prima facie* case, the complainant's case fails.

I also note that Respondent's counsel argued in her closing brief (page 10), that I may only consider the evidence presented by Mr. Svendsen in making a *prima facie* determination. However, since the Respondent did not move for dismissal at the conclusion of Mr. Svendsen's case and presented evidence on its behalf, I will consider the entire record on the *prima facie* issue.

chief, whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against him for engaging in an protected activity. *See Carroll v. U.S. Dept. of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996) (case below *Carroll v. Bechtel Power Corp.*, 91-ERA 46 (Sec'y February 15, 1995)). Consequently, during the entire case in chief process, the complainant retains the burden of proof.

Affirmative Defense

In the event that a complainant proves the case in chief by a preponderance of the evidence, a respondent may still avoid liability for the discrimination through a statutory and regulatory affirmative defense. According to 49 U.S.C. §§ 42121 (b) (2) (B) (ii) and (iv) and 29 C.F.R. § 1979.109 (a), a complainant may not obtain relief under the Act if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of “clear and convincing,” that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. *See Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995).

Issue No. 1 - Protected Activity

As mentioned above, the first requisite element for a *prima facie* case is a protected activity. The Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations” *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least “touch on” the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

The implied purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving or relating to violations of any FAA order, regulation, or standard concerning air carrier safety also affects the scope of protected activity. 49 U.S.C. § 42121 (a) (1). The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because “[a] narrow hyper technical reading” of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raised safety concerns. *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied* 478 U.S. 1011 (1986). Such statutes

have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. Kohn, *The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental whistle blower cases, the underlying purposes for the whistle blower protection and principles are readily adaptable to Mr. Svendsen's case. Consequently, a protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government.

Stepping through these elements, and considering the broad and remedial purposes of the safety provisions in AIR 21, I first find that Mr. Svendsen's complaint about dust obstruction at Parker Airport to the local police and Mr. Kelly did satisfy the requisites of the first element. On November 3, 2001, in accordance with his pilot obligations under the FAR, Mr. Svendsen reported reduced visibility, down to one mile, caused by road race dust at the Parker Airfield. Since the facility was an uncontrolled airport with approach and landing minimum of three miles for several categories of pilots, the reduced visibility placed the airfield below FAA approved approach and landing minimums for some types of aviators, including air carrier pilots flying under FAR Part 135. In the absence of a published NOTAM, such reduced visibility represented an unexpected, potential flying safety hazard to other pilots, including air carrier pilots,¹⁵ flying to Parker Airport with intention of landing. As a result, his report to the police and Mr. Kelly about the unexpected reduced airfield visibility certainly touched on air carrier safety, consistent with the purpose and intent of AIR 21.

Second, and for similar reasons, Mr. Svendsen's concern about the potential safety hazard was objectively reasonable. Having checked the published NOTAMs and finding no information about any visibility problem at Parker Airfield on November 3, 2001,¹⁶ the nature of the dust obstruction was both unexpected, unannounced, and a potential problem for some pilots flying into Parker Airfield. Later, in their conversation, Mr. Kelly told Mr. Svendsen that the FAA was already aware of the potential hazard. However, that exchange did not change the reasonableness of Mr. Svendsen's complaint since I have determined that the FAA did not actually publish Mr. Kelly's NOTAM on reduced visibility and Mr. Svendsen found no such official notice.

¹⁵According to Mr. Kelly, other air carriers, including Sun Care and Native American, fly in and out of Parker Airfield.

¹⁶While Mr. Svendsen might have received notice of the potential visibility hazard had he check with the airport operations, he was not under a requirement to do so because the airfield was uncontrolled.

Likewise, Mr. Svendsen's decision to take off in such reduced visibility does not impeach the reasonableness of concern for inbound pilots. As he explained, Mr. Svendsen was able to take off under instrument flight rules, which only require 1/2 mile of visibility. Yet, any pilot flying VFR or a Part 135 pilot (like Mr. Svendsen) need at least three miles of visibility for an approach and landing at Parker Airfield.

Additionally, even though later in the morning the reduced visibility greatly improved due to favorable winds to the extent that no flying hazard remained, both Mr Kelly and Mr. Svendsen have confirmed the existence of obscured airfield visibility some time in the morning during calm winds. Consequently, the subsequent improvement in the airport visibility did not adversely affect the reasonableness of Mr. Svendsen's earlier complaint about reduced visibility.

For the reasons noted above, in the absence of a published NOTAM about a potential for reduced visibility at the VFR airfield, the limited visibility of one mile in the morning of November 3, 2001 due to road race dust did represent an objectively reasonable flight safety hazard to inbound pilots unaware of the unusual conditions at Parker Airfield at that time.

The third element of a report to an employer or Federal Government does cause a technical pause because Mr. Svendsen made his air safety report to the Colorado River Indian Tribes police, and Mr. Kelly, an employee of the local Indian tribe. Neither the police department nor Mr. Kelly employ Mr. Svendsen. They are also not part of the Federal Government. However, recognizing that application of narrow and technical interpretations is inconsistent with the purpose of AIR 21, I find a sufficient federal nexus in this case to satisfy this requirement. Notably, after Mr. Svendsen discovered the dust obstruction, and in accordance with FAR Part 135.67, he reported the situation to the Prescott Flight Service Station, a Federal Government entity.¹⁷ When the personnel at the Prescott FSS seemed unable to either post a NOTAM about his reported dust hazard or issue a PIREP, they told Mr. Svendsen to contact the local authorities. Complying with that instruction from a Federal entity, Mr. Svendsen then talked to the airport manager and called the local Indian police department, which were the government entities exercising jurisdiction over the Parker Airfield, in place of the Federal Government.

In summary, having determined that all three requisite factors are present in Mr. Svendsen's case, I specifically find that Mr. Svendsen's November 3, 2001 report of reduced visibility at the Parker Airport to Mr. Kelly and the local police was a protected activity.

¹⁷While Mr. Svendsen's call to the Prescott FSS sometime after 9:00 a.m. on November 3, 2001 about reduced visibility was clearly a protected activity, the existence of that particular report did not come to Air Methods' attention until quite some time after Air Methods' November 12, 2001 termination of Mr. Svendsen's employment (See Prescott FSS letter, dated December 16, 2001 (RX 16)). Thus, as discussed later, since Air Methods was unaware of that particular visibility complaint, Mr. Svendsen would not be able to establish a *prima facie* case of discrimination based on his contact with the Federal authorities about the dust hazard on November 3, 2001.

Issue No. 2 - Mr. Svendsen's Case in Chief

Since Mr. Svendsen engaged in a protected activity, I now must consider whether he has proven by a preponderance of the evidence that his protected activity of reporting reduced visibility at the Parker Airport to the local police on November 3, 2001 contributed to his termination of employment on November 12, 2001.

A. *Prima Facie* Case

As previously discussed, Mr. Svendsen may establish a *prima facie* case of discrimination by showing: (1) he engaged in a protected activity; (2) Air Methods was aware of the activity; (3) he suffered an adverse personnel action; and, (4) the circumstances raise the inference that his protected activity contributed to the unfavorable personnel action.

Having established the first element of a protected activity, Mr. Svendsen is readily able to establish the remaining three factors necessary for a *prima facie* case of discrimination. For the second element, Air Methods became aware of Mr. Svendsen's visibility reports to the local Indian police and Mr. Kelly when Mr. Kelly called the company a few days later and complained about Mr. Svendsen's actions. Mr. Svendsen's employment termination, the ultimate adverse personnel action, satisfies the third element. And, the temporal proximity between Mr. Svendsen's November 3, 2001 protected activity and Air Methods' November 12, 2001 termination decision does raise a reasonable inference that his protected activity contributed to his separation from Air Methods.¹⁸

B. Air Methods' Rebuttal and Mr. Svendsen's Ultimate Burden of Proof

Although Mr. Svendsen has established a *prima facie* case of discrimination, Air Methods has responded with evidence of purported legitimate business reasons for the company terminating his employment. As a result, Mr. Svendsen's *prima facie* case becomes irrelevant and I must now determine whether Mr. Svendsen can prove by a preponderance of the evidence that his employment discharge was based in part on his protected activity.

Mr. Svendsen's AIR 21 discrimination complaint is based on the allegation that his November 3, 2001 complaint about dust obstruction at Parker Airfield was the cause of his employment termination nine days later. To prove that allegation, Mr. Svendsen testified the Air Methods told him that he was being terminated because of his November 3, 2001 complaint. According to Mr. Svendsen, no other reason was given. I have already rejected Mr. Svendsen's recollection of the November 12, 2001 meeting in favor of the more probative testimony of two other participants, Mr. Wheeler and Ms. Bailey. Consequently, the Air Methods' stated reasons for Mr. Svendsen's termination were failure to wear a uniform, failure to follow company procedures, disrespectful comments about his supervisor, poor interpersonal skills with customers and coworkers, and unprofessional behavior on November 3, 2001.

¹⁸See *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan 5, 1993).

In considering the evidence relating to Mr. Svendsen's discharge, I first note the timing of Air Methods' termination response to at least two of the company's stated legitimate business reasons, the uniform deficiency and failure to follow company procedures, cast some favorable light on Mr. Svendsen's position that his November 3, 2001 protected activity is the real reason he was separated.

Specifically, the uniform deficiency existed well before Mr. Svendsen's November 3, 2001 dust obstruction complaint. In fact, during the entire time he flew for Air Methods, Mr. Svendsen never wore a uniform. Arguably, Mr. Titus' complaint about Mr. Svendsen's lack of a uniform may have elevated the company's concern. But, before November 3, 2001, the company seemed remarkably unconcerned about Mr. Svendsen's pilot clothing. The company's responses consisted of Mr. Grajeda putting new uniform order forms in Mr. Svendsen in-basket and reminding him of the requirement.

In a similar manner, until November 3, 2001, Air Methods' response to Mr. Svendsen's multiple failures to follow company procedures hardly rose to the level of termination. For example, when in response to Mr. Svendsen's apparent violation of company policy about animals in the base operations, Mr. Grajeda, after consulting with Ms. Bailey, simply told Mr. Svendsen that if he was engaged in such an activity, he should stop it. Or, when Mr. Svendsen failed to follow the company's proper expense report procedures, Mr. McJohnston simply returned to the reimbursement request to Mr. Svendsen for the requisite approval signature. Concerning unauthorized flights and incident of leaving an aircrew in Kingman, Mr. Grajeda just reminded Mr. Svendsen of the proper procedures and nothing further happened to Mr. Svendsen. Apparently, prior to Mr. Svendsen's November 3, 2001 visibility complaint, none of these incidents, individually or combined, were sufficiently serious enough to warrant a meeting in Denver. Then, suddenly nine days after his November 3, 2001 dust hazard complaint, these problems were included as reasons for his termination.

Thus, the inclusion of the uniform deficiency and procedural violations, including feeding a stray cat, as reasons for Mr. Svendsen's discharge does cause a reflective pause about Air Methods' actual reason for firing Mr. Svendsen. However, upon weighing all the probative evidence in this case, I find the possible adverse inference associated with presenting uniform and procedure problems to Mr. Svendsen as discharge reasons on November 12, 2001 is clearly overcome by the fact that two significant, and separate, complaints about Mr. Svendsen did converge on Air Methods' headquarters in the week following Mr. Svendsen's November 3, 2001 visibility complaint.

The first complaint came from Mr. Titus, through Guardian Air. Mr. Titus was both a crew member with Mr. Svendsen and an employee of Guardian Air, which is a contractual customer of Air Methods. His formal complaint to his Guardian Air supervisor identified both Mr. Svendsen's interpersonal difficulties with his coworkers and his disrespectful comments and attitude toward his supervisor, Mr. Grajeda. Mr. Svendsen's behavior had become sufficiently disruptive to air ambulance operations that Mr. Titus was motivated to file a formal complaint with Guardian Air which in turn informed Air Methods of the problem. Notably, there is no evidence in the record that either Mr. Titus or Guardian Air were aware of Mr. Svendsen's dust obstruction complaint or his

behavior on November 3, 2001. Thus, Air Methods' expressed termination reasons involving Mr. Svendsen's poor interpersonal skills with co-workers and customers, and his disrespectful attitude towards his supervisor were legitimate business concerns that came to light through a process completely independent of Mr. Svendsen's November 3, 2001 complaint.

The second complaint arriving at Air Methods a few days after November 3, 2001 came from Mr. Kelly. Unlike Mr. Titus' concerns, Mr. Kelly's concerns were directly related to Mr. Svendsen's visibility complaint of November 3, 2001, which is the protected activity in this case. Consequently, at first pass, that connection may seem sufficient to establish his protected activity did contribute to Air Methods' termination of his employment, thus supporting a finding of prohibited discrimination under AIR 21. Once again, however, a deliberative and close examination of the events of November 3, 2001 highlights a critical distinction between Mr. Svendsen's complaint of reduced visibility, Mr. Kelly's report of the events to Air Methods, and Air Methods' response.

In review, on that Saturday morning of November 3, 2001, Mr. Kelly first became aware of Mr. Svendsen when one of his employee's told him that Mr. Svendsen was "raising hell" about the race. Mr. Kelly had prior experience with Mr. Svendsen's overbearing behavior toward his airport employees and believed that problem had been resolved. Apparently not.

When Mr. Kelly saw Mr. Svendsen, he was very upset, loud, and belligerent about the road race, claiming it was unsafe to fly. Mr. Kelly disagreed and told Mr. Svendsen that the FAA knew about the race and potential visibility problems. Mr. Svendsen insisted the event be investigated and stopped. Mr. Kelly then informed Mr. Svendsen that the race had been previously approved by local authorities. However, Mr. Svendsen persisted with his demands and claimed that he would make sure the race didn't occur again.

Due to this exchange, Mr. Kelly decided to contact Air Methods. I have considered that Mr. Kelly's complaint does intertwine somewhat with Mr. Svendsen's protected activity. I also recognize that Mr. Kelly may have harbored some animosity towards Mr. Svendsen because he did call the local police anyway, which may have also caused some disruption. However, I also notably observe that Mr. Kelly had past behavioral difficulties with Mr. Svendsen and his overbearing demeanor towards airport employees, which Mr. Svendsen chose to repeat on November 3, 2001. Further, Mr. Kelly must have stressed the behavior aspect of the incident because after receiving Mr. Kelly's complaint, Mr. Grajeda counseled Mr. Svendsen not to display authority over the airport employees. Finally, when Mr. Kelly contacted Air Methods' headquarters, he stressed that if Mr. Svendsen did not change his behavior, he wanted Mr. Svendsen transferred. In light of those factors, I ultimately find as credible Mr. Kelly's testimony that his concern was focused on Mr. Svendsen's belligerent and overbearing behavior and not the reduced visibility report itself. Consequently, the preponderance of the more probative evidence establishes that in a manner similar to Mr. Titus, Mr. Kelly had enough of Mr. Svendsen's inappropriate behavior toward the airport employees and informed Air Methods of his concerns.

Also significantly, even if Mr. Kelly's complaint was too entangled with Mr. Svendsen's

protected activity to separate, the crucial distinction between the visibility complaint and Mr. Svendsen's behavior on November 3, 2001 is still established by the credible testimony of Mr. Wheeler and Ms. Bailey and to some extent, Mr. Grajeda. Their testimony represents the preponderance of the more probative evidence that Air Methods' concern about Mr. Svendsen's actions on November 3, 2001, and, in part, the decision to terminate Mr. Svendsen, was directed solely towards Mr. Svendsen's unprofessional and overbearing interaction with the personnel at Parker Airport and not his reports of reduced visibility.

In other words, Air Methods did not terminate Mr. Svendsen due to the fact he reported reduced visibility at the airfield. Instead, the company responded to the manner in which he presented his concerns to Mr. Kelly and the Parker Airport employees. This distinction is significant, and fatal, to Mr. Svendsen's AIR 21 discrimination complaint. The employee protection provision of AIR 21 only protected Mr. Svendsen's reports of reduced visibility at the Parker Airport. The statute did not also protect his belligerent and unprofessional behavior with Mr. Kelly and his employees in presenting that concern. Consequently, I conclude the preponderance of the more probative evidence shows Mr. Svendsen's choice of behavior, and not his protected activity, on November 3, 2001 contributed to the loss of his job as an Air Methods' air ambulance pilot.

CONCLUSION

The preponderance of the more probative evidence establishes that Mr. Svendsen's protected activity of raising concerns about reduced visibility at Parker Airfield on November 3, 2001 did not contribute to his employment termination. Instead, Mr. Svendsen's unprofessional behavior toward Parker Airfield personnel, coupled with poor interpersonal skills with coworkers, and a disrespectful attitude towards his supervisor led to his loss of employment with Air Methods. Accordingly, Mr. Svendsen has failed to carry his burden of proof and his AIR 21 discrimination complaint must be dismissed.¹⁹

ORDER

The discrimination complaint of MR. JAN SVENDSEN against AIR METHODS, INC. brought under the employee protection provisions of AIR 21 is **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: February 26, 2003

¹⁹Since Mr. Svendsen has failed to establish the requisite case in chief, I need not address the third issue of Air Methods' affirmative defense that it would have separated Mr. Svendsen even in the absence of the November 3, 2001 event.

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor (“Secretary”) pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board (“Board”), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109 (c) and 1979.110 (a) and (b).